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AMER RECORDS AND BRIEFS

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

BETH S. BRINKMANN
(Counsel of Record)
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
Tel: (202) 887-1544
Fax: (202) 887-0763

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZEN
MORRISON & FOERSTER, LLP
425 Market Street
San Francisco, CA 94105-2482
Tel: (415) 268-7000
Fax: (415) 268-7522

Counsel for Respondents

G. STEVEN ROWE
Attorney General
PAUL STERN
Deputy Attorney General
(Counsel of Record)
MELISSA REYNOLDS O'DEA
CHRISTOPHER C. TAUB
PETER B. LAFOND
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568
Fax: (207) 287-3145

Counsel for Petitioner

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10-04-2005	Unredacted Appellant Brief and Appendix (Vol. II) (Provisionally Filed Under Seal) filed by Paul Stern for Appellant G. Steven Rowe
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12-19-2005	Redacted Version of Brief filed by Appellees New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., Vermont Truck and Bus Association Inc.
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02-10-2006	Case Argued 02-10-2006. Boudin, Ch. J., Stahl, Howard, JJ. Paul Stern for Appellant G. Steven Rowe. Ruth N. Borenstein for Appellees
05-19-2006	Opinion Filed. Chief Judge Michael Boudin, Senior Judge Norman H. Stahl, and Judge Jeffrey R. Howard, Signed Judge Jeffrey R. Howard, Authoring Judge.
05-19-2006	Judgment entered by Chief Judge Michael Boudin, Senior Judge Norman H. Stahl, and Judge Jeffrey R. Howard. This cause came on to be heard on Appeal from the United States District Court for the District of Maine and was argued by counsel. Upon consideration whereof, it is now here Ordered, Adjudged and Decreed as follows: The District Court's Judgment as it pertains to 22 M.R.S.A. § 1555-C(3)(C) and the second part of 22 M.R.S.A. § 1555-D is affirmed, but the judgment as it pertains to the first part of § 1555-D is reversed. The case is remanded to the District Court with instructions to amend the judgment consistent with the opinion issued this day. No costs are awarded
06-09-2006	Mandate issued

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No.

COMPLAINT
(INJUNCTIVE RELIEF SOUGHT)

NOW COME plaintiffs, the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., and the Vermont Truck & Bus Association, Inc., by and through their attorneys, Morrison & Foerster LLP and Jensen Baird Gardner & Henry, and for its Complaint state as follows:

1. This is an action, pursuant to 28 U.S.C. §§ 2201, 2202 and the Supremacy Clause of the United States Constitution, for declaratory and injunctive relief, seeking compliance by G. Steven Rowe, in his official capacity as Attorney General of the State of Maine, with 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4), also known as the Federal

Aviation Administration Authorization Act of 1994 (the "FAAAA").

2. Specifically, plaintiffs seek:

(a) a declaration that 22 M.R.S.A. §§ 1555-C(3)(A) and (C) are preempted by federal law under the FAAAA and the Supremacy Clause – because those provisions purport to regulate which "Delivery Services" can be utilized for shipping a Delivery Sale of Tobacco Products to a person in Maine, and what data Delivery Services must collect from shippers of such packages;

(b) a declaration that 22 M.R.S.A. § 1555-D is preempted by federal law under the FAAAA and the Supremacy Clause as applied to motor carriers and air/ground intermodal carriers – because that provision purports to regulate from whom and to whom such carriers may make a delivery of Tobacco Products in Maine; and

(c) a permanent injunction enjoining defendant from enforcing 22 M.R.S.A. §§ 1555-C(3)(A) and (C) altogether, and from enforcing 22 M.R.S.A. § 1555-D as against motor carriers and air/ground intermodal carriers.[1]

[1] Hereinafter, Me. Rev. Stat. Ann. tit. 22, § 1555-D and Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(3)(A) and (C) are referred to collectively as the "Challenged Provisions." The text of, and all citations to, the Challenged Provisions can be found in the Act of June 9, 2003, ch. 444, 2003 Me. Laws 444 (regulating delivery and sales of tobacco products and preventing sales of tobacco products to minors).

JURISDICTION AND VENUE

3. This action arises under the Constitution and laws of the United States, including the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; and the FAAAA, 49 U.S.C. §§ 14501(c)(1), 41713(b)(4). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1337(a) (Act of Congress regulating commerce).

4. This is a proceeding for a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201, 2202 and the Supremacy Clause. This action presents an actual controversy within the Court's jurisdiction.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) and (2), because the claims asserted in this Complaint are based on events occurring in this district, and defendant maintains offices and performs official duties within this district.

PARTIES TO THIS ACTION

6. Plaintiffs are the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, and the Vermont Truck & Bus Association, Inc. (collectively the "Carrier Associations").

7. The New Hampshire Motor Transport Association ("NHMTA") is a non-profit trade association that was founded in the 1930s. It has more than 350 members engaged in the commercial delivery of packages containing property. The NHMTA's mission includes to promote a motor transport system that will serve the citizens of New Hampshire reliably, efficiently, safely, and economically; serve as a spokesperson for motor transport before federal,

state, and municipal governmental bodies; communicate the mission of motor transport to the general public through media and personal appearances; foster the principles of the Association through promotion of its services that may enhance the operation of its participating members; encourage cooperation, courtesy, and safety among highway users; and encourage construction and maintenance of safe and adequate highways. The Challenged Provisions explicitly affect the services of those of the NHMTA's delivery service members that are, have been, and/or desire to be engaged in the transportation of tobacco products to consignees in Maine, among other states.

8. The Massachusetts Motor Transportation Association, Inc. (the "MMTA"), which was founded in 1919, is a non-profit trade association that has more than 300 members engaged in the commercial delivery of packages containing property. The MMTA's mission includes to foster, develop, encourage, and promote the business of motor carrier transportation through the sound, economical, safe and efficient operations of its members; to encourage, maintain, and promote the inherent advantages of safe, and efficient highway transportation; to foster and maintain just and lawful trade practices in the motor carrier business and related businesses; and to strive for and encourage uniformity in motor carrier business practices and reciprocity among states with respect thereto. The Challenged Provisions explicitly affect the services of those of the MMTA's delivery service members that are, have been, and/or desire to be engaged in the transportation of tobacco products to consignees in Maine, among other states.

9. Founded in 1928, the Vermont Truck & Bus Association, Inc. ("VTBA") is a non-profit trade association that has more than 250 members. The VTBA's purposes include promoting the business of motor carrier transportation; enhancing the industry's efficiency, productivity, and competitiveness; and promoting highway safety. Its members operate truck fleets ranging from family-owned trucking businesses based in Vermont to large enterprises headquartered elsewhere. Most of its trucking members are engaged in the commercial delivery of packages containing property. These members include interstate package carriers, such as United Parcel Service and Federal Express, as well as truckload carriers, and regional carriers. The Challenged Provisions explicitly affect the services of those of the VTBA's delivery service members that are, have been, and/or desire to be engaged in the transportation of tobacco products to consignees in Maine, among other states.

10. The Carrier Associations have standing to bring suit on behalf of their members because their ground and air/ground intermodal carrier members otherwise would have standing to sue in their own right; the interests that the Carrier Associations seek to protect are germane to the Carrier Associations' purposes; and neither the claims asserted nor the prospective relief requested requires the participation of individual carrier members in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

11. Defendant G. Steven Rowe is sued in his official capacity as the Attorney General of the State of Maine. Under subsection 8 of 22 M.R.S.A. §1555-C, and subsection 3 of 22 M.R.S.A. § 1555-D, the Attorney General is responsible for enforcement of the Challenged Provisions

by seeking injunctive relief, fines, penalties, and equitable relief.

GENERAL ALLEGATIONS

12. The trucking industry is an essential component of the American economy. Americans and the American economy benefit from the cargo shipped by truck every day, including electronic equipment, shoes and clothing, agricultural goods, petroleum products, and machine parts. Trucks carry approximately 60% of the nation's domestic freight. In 1997 (the date of the last economic census), for-hire motor and air carriers transported more than 3.5 billion tons of goods, valued in excess of $4 trillion. The trucking industry's annual contribution to the gross domestic product is more than $260 billion.

13. Due to the popularity of the Internet, home shopping networks, mail-order catalogues, and various forms of "e-commerce," a significant portion of the retail transactions across the United States now takes place via direct sales transactions in which businesses and consumers communicate through the Internet, telephone, facsimile, or mail. A corresponding portion of the business of cargo carriers – including the Carrier Associations' members – is devoted to transporting and delivering the goods purchased in such transactions. These direct sales operations depend on interstate cargo carriers to transport and deliver the goods they sell; the carriers, in turn, depend on these operations for a significant portion of their business.

A. The Challenged Provisions Of The Maine Statute.

14. Although the United States Congress has mandated that carriers be subject exclusively to uniform federal laws in providing transportation and delivery services, Maine has enacted legislation that impermissibly regulates the manner in which carriers provide service. On June 9, 2003, Maine enacted Public Law 444, "An Act To Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors," which became effective on September 13, 2003 (the "Statute"). In relevant part, it enacted 22 M.R.S.A. sections 1555-C and 1555-D.

15. In relevant part, 22 M.R.S.A. §1555-C ("Delivery Sales Of Tobacco Products") provides as follows:

> (3) **Requirements For Shipping A Delivery Sale.** The following provisions apply to a tobacco retailer shipping Tobacco Products pursuant to a Delivery Sale.
>
> (A) Prior to shipping, the tobacco retailer shall provide to the Delivery Service the age of the purchaser . . .
>
> . . . .
>
> (C) The tobacco retailer shall utilize a Delivery Service that imposes the following requirements:
>
> (1) the purchaser must be the addressee;
>
> (2) the addressee must be of legal age to purchase tobacco products and must sign for the package; and

(3) if the addressee is under 27 years of age, the addressee must show valid government-issued identification that contains a photograph of the addressee and indicates that the addressee is of legal age to purchase tobacco products.

Elsewhere, the Statute defines the term "Delivery Service" to mean "a person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages or other containers." 22 M.R.S.A. § 1551(1-C). The Carrier Associations' members qualify as "Delivery Services" under the Statute. The Statute also defines a "Delivery Sale" as "a sale of tobacco products to a consumer in this state when . . . the tobacco products are delivered by use of a delivery service." 22 M.R.S.A. § 1551(1-B). Under Maine law, the term 'tobacco products' "includes any form of tobacco and any material or device used in the smoking, chewing or other form of tobacco consumption, including cigarette papers and pipes." 22 M.R.S.A. § 1551(3).

16. Thus, to lawfully be utilized to deliver packages containing tobacco products to an address in Maine, a carrier must:

- receive information from the shipper as to the purchaser's age;
- require that Maine-bound packages containing tobacco products be addressed to the purchaser;
- require that such purchasers be of legal age to purchase tobacco products;
- require that addressees of such packages personally sign for the package; and

- where the purchaser is indicated to be age 18 through 26, require that the purchaser show a valid government-issued photo-identification indicating that the purchaser is at least 18 years old.

17. Subsection (8) of 22 M.R.S.A. § 1555-C enables the Attorney General to enforce these provisions against tobacco retailers in district court or superior court, and to seek injunctive relief, fines, penalties and equitable relief for any violation. In addition, a violation of these provisions is considered a violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A.

18. In relevant part, 22 M.S.R.A §1555-D ("Illegal Delivery of Tobacco Products") provides as follows:

> A person may not knowingly transport or cause to be delivered to a person in this state a Tobacco Product purchased from a person who is not licensed as a tobacco retailer in this state, except that this provision does not apply to the transportation or delivery of Tobacco Products to a licensed tobacco distributor or tobacco retailer. A person is deemed to know that a package contains a tobacco product if the package is marked in accordance with the requirements of Section 1555-C, Subsection 3, Paragraph B or if the person receives the package from a person listed as an unlicensed tobacco retailer by the Attorney General under this Section.

19. Thus, complying with the plain terms of section 1555-D requires a carrier making deliveries in Maine:

- to determine whether the shipper of each package traveling to Maine is on the Attorney General's list of known unlicensed tobacco retailers; and

- then, for any such package, either to prevent the package from being delivered, or
- to deliver it only after consulting the Attorney General's list of licensed tobacco retailers and determining that the recipient is either a licensed retailer or a licensed distributor;

- to examine each package traveling to Maine to determine whether it is marked as containing tobacco products; and
  - then, for any such package, to consult the Attorney General's lists of licensed tobacco retailers and distributors to determine whether the shipper or addressee is licensed either as a tobacco retailer or a tobacco distributor in Maine; and
  - if not, then to prevent the package from being delivered;
- to determine whether, even if not marked as containing tobacco products, the carrier knows that the package contains tobacco products; and
  - then, for any such package, to consult the Attorney General's lists of licensed tobacco retailers and distributors to determine whether the shipper or addressee is licensed either as a tobacco retailer or a tobacco distributor in Maine; and
  - if not, then to prevent the package from being delivered.

20. Subsection(2)(A) of 22 M.R.S.A. § 1555-D provides that a person who violates § 1555-D commits a civil violation for which a fine of not less than $50 nor more

than $1500 may be adjudged for each violation. Subsection(2)(B) of 22 M.R.S.A. § 1555-D provides that the employer of a person who, while working and within the scope of that person's employment, violates § 1555-D commits a civil violation for which a fine of not less than $50 nor more than $1500 may be adjudged for each violation.

21. Subsection (3) of 22 M.R.S.A. § 1555-D enables the Attorney General to enforce these provisions against carriers in district court or superior court, and to seek injunctive relief, fines, penalties and equitable relief for any violation. In addition, a violation of these provisions is considered a violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A.

22. Except as set forth above, the Carrier Associations expressly do not challenge 2003 Public Law 444, or its enactment and/or amendment of 22 M.R.S.A. §§ 1551, 1555-C, and 1555-D. Those unchallenged provisions regulate purchasers and retailers of tobacco product delivery sales in a manner that does not relate to the carriers' prices, routes, or services.

B. Maine's Regulation Of, And Prohibition Of Delivery By, Carriers.

23. On August 28, 2003, the Tobacco Enforcement Coordinator of the State of Maine Office of the Attorney General, sent a letter addressed "Dear Delivery Service" to various carriers doing business in Maine, including members of the Carrier Associations. The letter informs carriers that "Maine has enacted a new law that affects delivery of tobacco products" and "regulates delivery sales of tobacco products" to consumers in Maine." The letter

explains that: "Delivery services are prohibited from delivering tobacco products to consumers in Maine unless purchased and shipped from a licensed tobacco retailer." It further informs carriers that they "must only accept shipments from retailers licensed by the Maine Department of Human Services," and encloses "a list of known unlicensed and licensed tobacco retailers." The letter notes that "[i]llegal delivery of tobacco products is a civil violation," subject to fines, and that under the Maine Unfair Trade Practice Act, the State may "obtain a court order enjoining a delivery service from delivering tobacco products to Maine consumers." Finally, the letter states: "We expect full compliance with this law."

C. The Preempting Federal Statute.

24. The United States Congress enacted the FAAAA effective January 1, 1995. The FAAAA provides in relevant part that "a State . . . *may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service*" of any motor carrier, or intermodal air/ground carrier with respect to the transportation of property. 49 U.S.C. § 14501(c)(1) (relating to motor carriers) (emphasis added); 49 U.S.C. § 41713(b)(4)(A) (relating to air and intermodal air/ground carriers) (emphasis added).

25. In enacting the FAAAA, Congress expressly found that the regulation of intrastate transportation of property by the states had "imposed an unreasonable burden on interstate commerce; [and] impeded the free flow of trade, traffic, and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994). Through the FAAAA, Congress sought

to ensure that interstate carriers are able to provide service subject exclusively to a uniform body of federal law, and not by a "patchwork" of individual states' laws and regulations. H.R. Conf. Rep. No. 103-677, § 601, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. Congress thereby intended to remove obstacles to "national and regional carriers attempting to conduct a standard way of doing business." *Id.* Congress specifically identified restrictions on "types of commodities carried" as one of the forms of state regulation eliminated by the FAAAA. *Id.* at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758.

26. Interpreting the air and intermodal carrier provision of the FAAAA, 49 U.S.C. § 41713, the United States Court of Appeals for the First Circuit has held that the FAAAA has a "broad reach," such that "[s]tate laws and regulations 'having a connection with or reference to' an air carrier's prices, routes or services are preempted." *United Parcel Serv., Inc. v. Flores-Galarza,* 318 F.3d 323, 335 (1st Cir. 2003). As the court held: "A sufficient nexus exists if the law expressly references the air carrier's prices, routes or services, or has a 'forbidden significant effect' upon the same." *Id.* (citation omitted).

27. In *Flores-Galarza,* the First Circuit held that the FAAAA preempted a Puerto Rico "statutory regime that prohibits an interstate air carrier from delivering any package unless the carrier first provides proof that the package's addressee has paid the appropriate excise tax, or the carrier prepays the amount of the tax on the addressee's behalf." *Id.* at 325. The court held that "[t]he challenged scheme both refers to and has a forbidden significant effect on [the plaintiff carrier's] prices, routes or services." *Id.* at 335.

28. Like the Challenged Provisions here, one aspect of the statutory scheme held preempted in Puerto Rico made certain deliveries unlawful. The court specifically held that the Puerto Rico statute that "forbids delivery unless and until a recipient produces a certificate from the Secretary ... significantly affects the timeliness and effectiveness of [the plaintiff carrier's] service" and was preempted. *Id.* at 335-36.

29. Also like the Challenged Provisions here, one aspect of the statutory scheme held preempted in Puerto Rico required carriers to take certain steps before they could make deliveries. The court specifically held that "the prepayment mechanism imposes extensive requirements that must be met before a carrier may make a lawful delivery," which imposed "a substantial burden on [the plaintiff carrier], in the form of additional labor, costs, and delays" and was preempted. *Id.* at 336.

D. The Challenged Provisions' Relation To Carriers' Services, Routes, And Prices.

30. The broad preemptive scope of the FAAAA precludes the enactment and enforcement of state laws related to carriers' services. Subsections (3)(A) and (3)(C) of section 1555-C violate that mandate because they expressly refer to and, indeed, regulate the manner in which carriers must operate in order to lawfully be utilized to transport Maine-bound packages containing tobacco products. Likewise, section 1555-D violates that mandate because it expressly refers to and, indeed, regulates the manner in which carriers must operate to avoid civil liability in transporting Maine-bound packages containing tobacco products.

31. Based on their express terms, the Challenged Provisions also have a significant effect on carriers' services. In order to comply with the Challenged Provisions, carriers have to devise and implement systems and procedures to:

(a) recognize when a Maine-bound package is indicated to contain tobacco products;

(b) determine whether the shipper of such packages is licensed in Maine as a tobacco retailer, and if the shipper is not so licensed, determine whether the addressee is licensed in Maine as a tobacco distributor or a tobacco retailer;

(c) for such packages, receive information about an addressee's age, and keep that information tied to the package as it moves through the carrier's system;

(d) require such packages to be delivered only to the named addressee (instead of to a mail room attendant, receptionist, or adult in a home);

(e) perform an identification check, when required for such packages;

(f) obtain a signature from the addressee of such packages; and

(g) make provisions for any such packages that the carriers determine cannot lawfully be delivered under the Maine Statute.

In addition, to comply with the Challenged Provisions, carriers have to devise and implement systems and procedures to:

(h) recognize when a Maine-bound shipment is from a shipper on the Attorney General's list of known unlicensed tobacco retailers;

(i) determine whether the addressee of such packages is licensed in Maine as a tobacco distributor or a tobacco retailer; and

(j) make provisions for any such packages that the carriers determine cannot lawfully be delivered under the Maine Statute.

32. As Congress expressly intended, *see* H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759, motor and intermodal carriers of property rely on the efficiencies of uniform procedures to provide their transportation and delivery services within and among the 50 states. Carriers' operations are engineered to provide speed, reliability, and efficiency. In large part, they depend on uniformity – that is, repetition of the same processes and procedures for all packages regardless of their destination. Such uniformity allows superior, reliable services to shippers and their consignees, and is essential in a highly competitive industry with numerous competitors, including the United States Postal Service.

33. In order to comply with the Challenged Provisions, and lawfully be utilized by tobacco retailers, carriers are prevented from employing their uniform procedures for Maine-bound packages. This disruption in uniformity does and will have a significant effect on the manner, timeliness, and effectiveness of the carriers' services, and on carriers' routes and prices.

34. For example, 22 M.R.S.A. § 1555-C(3)(C)(2) requires that Maine-bound packages containing tobacco products be delivered personally to the purchaser/addressee.

However, carriers typically complete a delivery by transporting a package to the recipient's address, not to a particular person at that address. Even where carriers offer a service to obtain a delivery signature, typically that signature can be obtained from any person (or, where specified, any adult) at the delivery address. Thus, carriers routinely deliver signature-required packages to persons such as business receptionists, mail room attendants, and stay-at-home parents. Requiring delivery of such packages only to the specific addressee would preclude such routine practices, and would force carriers to alter their manner of delivering packages. Delivery drivers will have to spend extra time at each stop while attempting to locate the addressee. The requirement places burdens on carriers comparable to those faced by process servers – burdens that high-volume cargo carriers are ill-equipped to handle. This requirement also has a significant effect on carriers' routes, by forcing them to reroute packages back to the carriers' facilities, make multiple delivery attempts, and, in some cases, reroute a package back to the sender, if the addressee cannot be located.

35. Similarly, carriers have to create procedures to identify, segregate, and separately process Maine-bound packages containing tobacco products. Potentially *every* Maine-bound package has to be inspected for markings indicating a tobacco product. Every package so identified has to be researched to determine the licensing of its shipper, and possibly its addressee. Carriers also have to create procedures to identify and process packages shipped by retailers on the Attorney General's list of known unlicensed tobacco retailers. Finally, carriers have to create procedures for packages that cannot lawfully be delivered

to the addressee, or for which the addressees are not available for signature.

36. Implementing these procedures has a significant effect on carriers' costs (including labor), and therefore they are related to carriers' prices.

37. Faced with the burdens and disruptions on their uniform services imposed by the Challenged Provisions, some carriers may terminate all deliveries of tobacco products to Maine. The resulting termination of that service plainly is a significant effect on carriers' services.

38. Since carriers have to undertake special procedures for deliveries to Maine, the Challenged Provisions have the potential of slowing down the delivery of *all* packages destined for Maine – not merely those packages that are marked as or known to contain tobacco products. The myriad efficiencies that come from a uniform system of delivery, and the attendant benefits to consumers, will be lost.

COUNT ONE – SUPREMACY CLAUSE (FAAAA PREEMPTION)

39. Plaintiffs incorporate by reference all of the foregoing paragraphs as though set forth fully herein.

40. The United States Constitution gives Congress the power to enact the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 3, cl. 2.

41. An actual controversy exists among the parties in that carriers have to meet the requirements of 22

M.R.S.A. § 1555-C in order to lawfully be utilized to deliver Maine-bound packages containing tobacco products, and have to comply with the requirements of 22 M.R.S.A. § 1555-D, and carriers contend that, pursuant to the Supremacy Clause, the FAAAA preempts enforcement of the Challenged Provisions.

42. Plaintiffs' members fear the civil penalties and enforcement actions authorized under 22 M.R.S.A. §§ 1555-D(2) and (3), and the loss of business from compliant retailers, if they fail to comply with the obligations directly and indirectly imposed by 22 M.R.S.A. § 1555-C.

43. The State has notified delivery services of the new law and warned them that "[i]llegal delivery of tobacco products is a civil violation, punishable by a fine of up to $1500," and that the State may obtain a court order "enjoining a delivery service from delivering tobacco products to Maine consumers." The threat that this preempted law will be enforced against the Carrier Associations' members is an irreparable harm that makes injunctive relief appropriate. In addition to the imminent enforcement of the Challenged Provisions, their unconstitutionality itself reinforces the irreparable harm carriers face.

44. The harm is irreparable for the additional reason that the Eleventh Amendment to the United States Constitution bars an award of retrospective monetary damages against the State or the individual defendant acting in his official capacity.

45. Plaintiffs are entitled to injunctive relief against enforcement of the Challenged Provisions because their members are and will continue to suffer irreparable harm

from enforcement of the challenged provision of the Statute.

COUNT TWO – 28 U.S.C. §§ 2201, 2202

(DECLARATORY RELIEF)

46. Plaintiffs incorporate by reference all of the foregoing paragraphs as though set forth fully herein.

47. Plaintiffs bring this cause of action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, to obtain a declaration of their members' rights with respect to the Challenged Provisions of the Maine Statute.

48. As alleged above, an actual controversy has arisen and now exists within the meaning of 28 U.S.C. § 2201, as to whether the Challenged Provisions are preempted by the FAAAA pursuant to the Supremacy Clause of the United States Constitution.

49. The Court has the power to adjudicate the rights of the parties with respect to this controversy and should grant declaratory relief under 28 U.S.C. § 2201.

WHEREFORE, plaintiffs respectfully request:

(a) a declaration that 22 M.R.S.A. §§ 1555-C(3)(A) and (C) are preempted by federal law under the FAAAA and the Supremacy Clause;

(b) a declaration that 22 M.R.S.A. § 1555-D is preempted by federal law under the FAAAA and the Supremacy Clause;

(c) a permanent injunction enjoining defendant from enforcing 22 M.R.S.A. § 1555-C(3)(A) and (C) altogether,

and from enforcing 22 M.R.S.A. § 1555-D as against motor carriers and air/ground intermodal carriers;

(d) an order granting plaintiffs the costs incurred to bring forth this Complaint; and

(e) such other and further relief as this Court may deem appropriate under law and equity.

Dated: October 10, 2003

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

MICHAEL A. NELSON
JENSEN BAIRD GARDNER & HENRY
10 Free Street
P.O. Box 4510
Portland, ME 04112-4510
Telephone: (207) 775-7271

By: /s/
Michael A. Nelson

Attorneys for Plaintiffs
NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.

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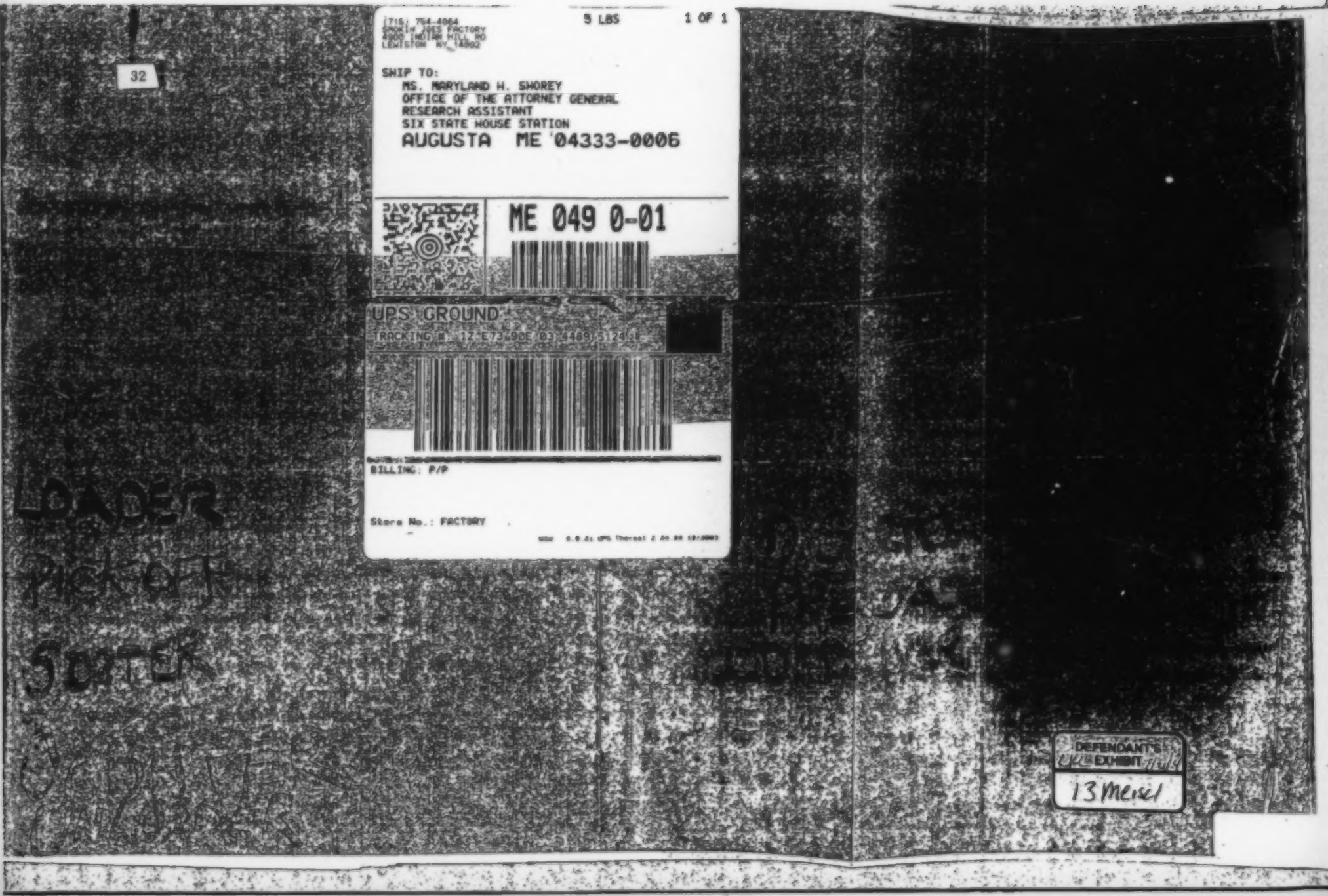

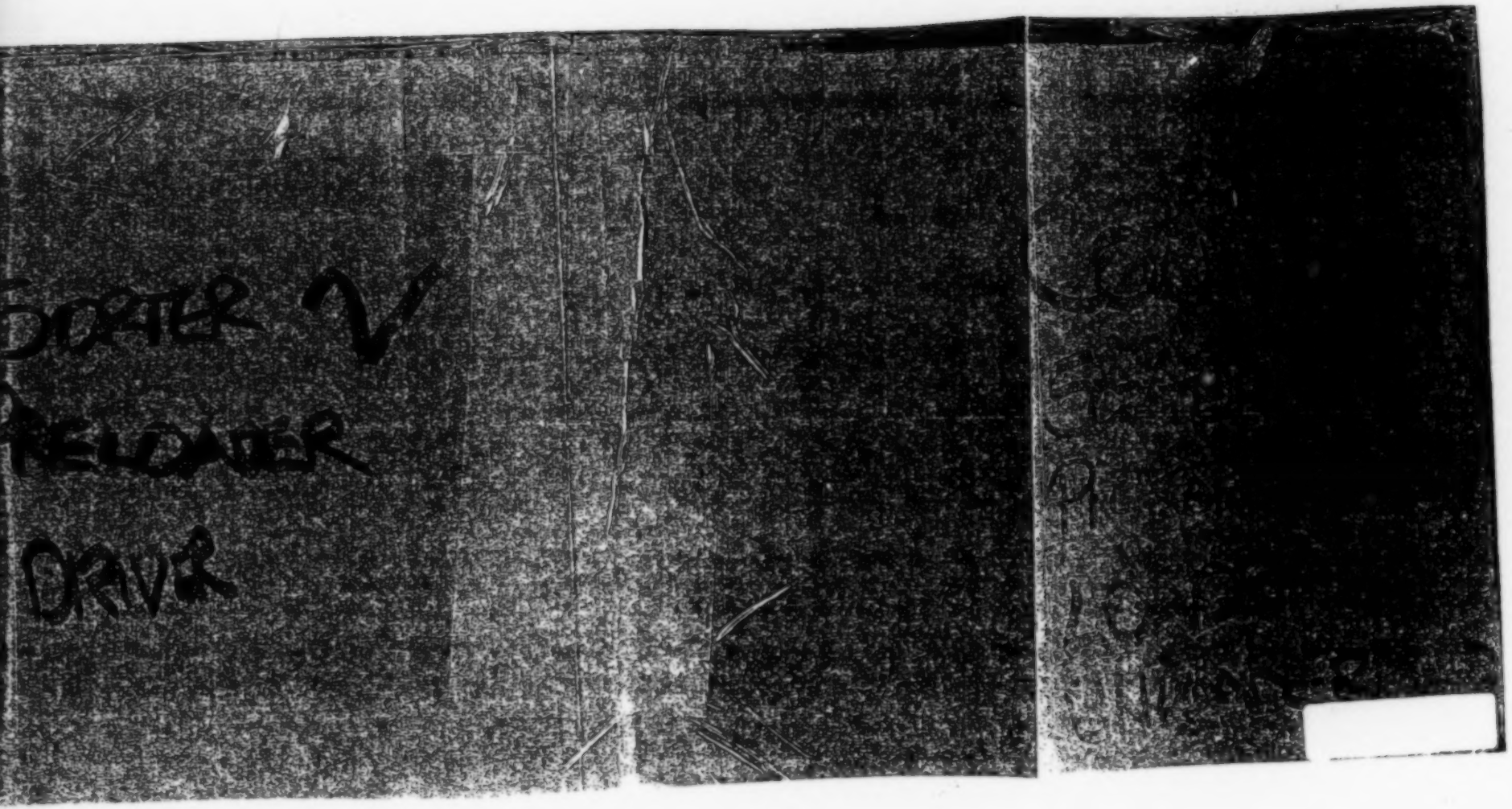
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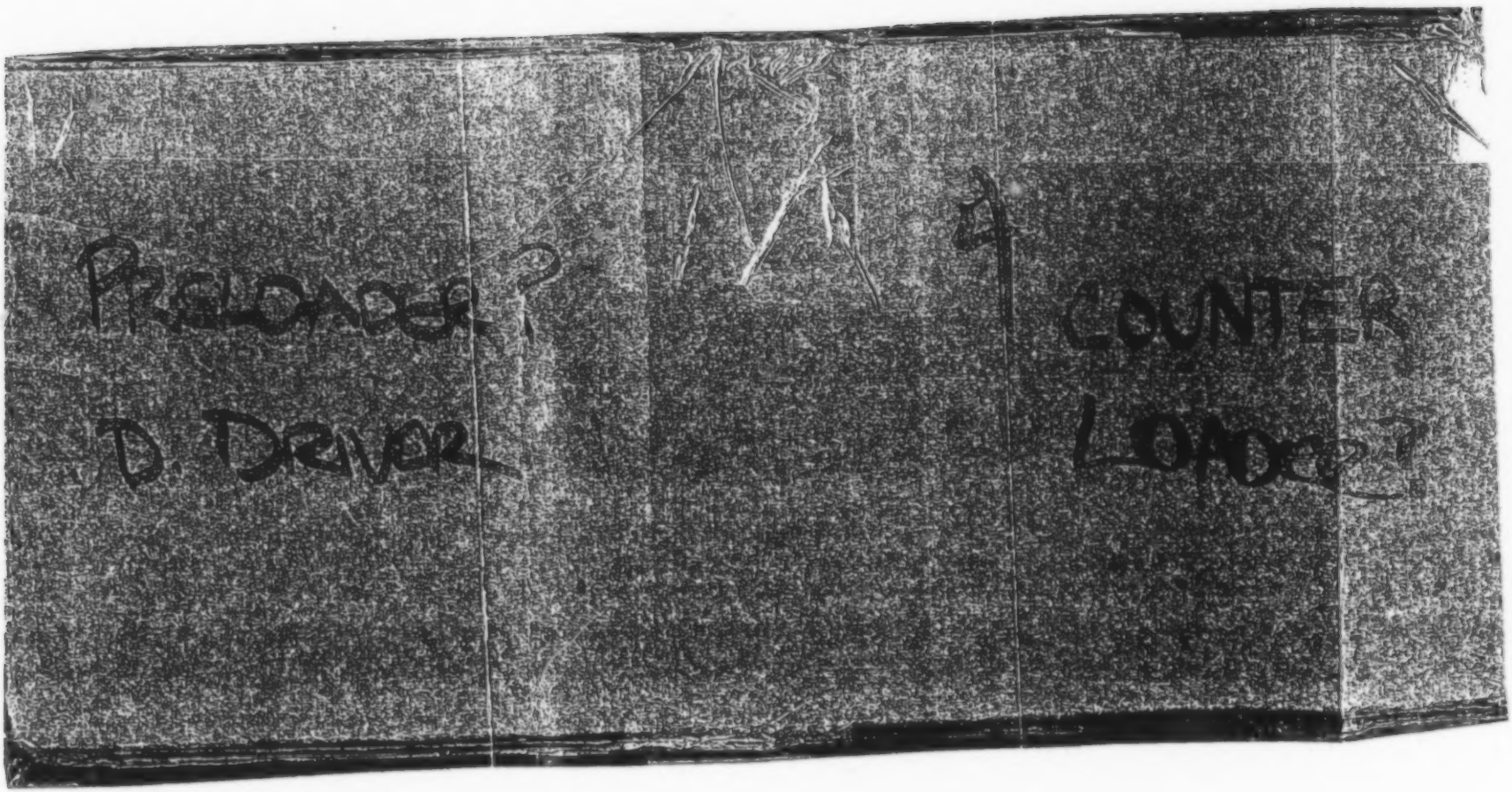
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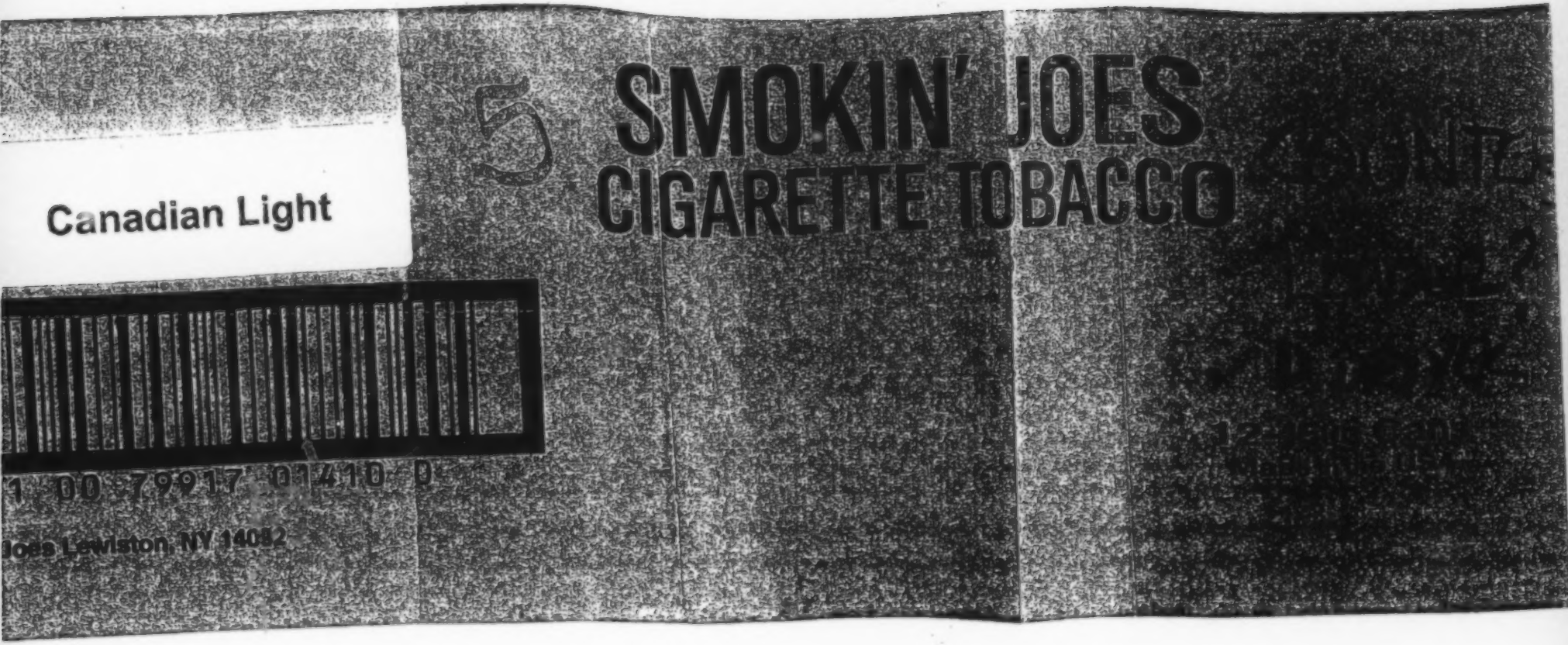
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Made in the USA

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BOX MEETS ALL CONSTRUCTION
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PRELOADER ?
D.DRIVER ?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC. Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No. 1:03-cv-178-DBH

DECLARATION OF DEBRA MEISEL
IN SUPPORT OF PLAINTIFFS' "AS APPLIED"
MOTION FOR SUMMARY JUDGMENT

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I, Debra Meisel, declare:

1. I have personal knowledge of the facts set forth below, and if called as a witness, I could and would so testify to them.

I. INTRODUCTION

A. Background and Experience with UPS's Services.

2. I am a Region Industrial Engineering Manager in the Corporate Industrial Engineering Department of United Parcel Service, Inc. ("UPS"), and work in UPS's corporate headquarters in Atlanta. I have been employed by UPS for 20 years in various capacities. I began my UPS career in Dallas in 1984 as a driver. In 1985, I was promoted to supervisor, initially in an Industrial Engineering position, then as an on-car (driver) supervisor. In 1988, I was promoted to be a Center Manager. In 1989, I was named to a Section Manager position in Industrial Engineering. In 1991, I was promoted to District Industrial Engineering Manager in the East Tennessee District. In 1994, I was named District Industrial Engineering Manager in the North New England District (which encompasses Maine). In 1997, I was named District Industrial Engineering Manager in the Central Florida District. In 1999, I was named to be the Industrial Engineering Manager for UPS Corporate Marketing in Atlanta. In 2001, I was promoted to Corporate Marketing Portfolio Manager. In 2003, I was placed in my current assignment. I am familiar with UPS's processes and procedures for the movement of domestic shipments.

3. Industrial Engineering is responsible for designing UPS operations in a manner that makes them produce the highest levels of service to our customers in the most efficient manner possible and at the lowest possible cost, in order to maintain our competitive advantages. To achieve these efficiencies and service levels, UPS, among other things, conducts time and motion studies to determine the most efficient way to perform UPS's services with the greatest speed, and with the highest comfort for and lowest risk to our employees. For example, UPS studies details as minute as what drivers do with the ignition key to their package cars when they are out of the vehicle delivering packages, in order to devise approved methods to minimize the time spent locating the key when returning to the vehicle. When UPS is able to shave even a second off a process that is repeated millions of times each day, it produces a material cumulative benefit to the overall efficiency of UPS's operations.

B. Background Facts About UPS.

4. UPS's principal business is the transport of packages throughout the United States, to and from the United States to 200 other countries around the world, and within certain other countries. UPS transports approximately 13.6 million packages each day – more than 3 billion packages each year. UPS transports approximately 65,000 packages per day, or 16 million packages per year, to the state of Maine. UPS is a member of the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., and the Vermont Truck & Bus Association, Inc.

5. I am informed and believe that one of UPS's operating entities, UPS Co., is authorized by the Federal Aviation Administration to operate as an air carrier for the transportation of property. Attached as Exhibit A to this declaration is a true and correct copy of UPS Co.'s Air Carrier Operating Certificate, issued by the Federal Aviation Administration. I am also informed and believe that another UPS entity, UPS, Inc., is engaged in the transportation of property by motor vehicle, and is affiliated with a direct air carrier, UPS Co., through common controlling ownership. Even where UPS operates as an air carrier, it uses ground vehicles to make its deliveries, including, for example, in Puerto Rico.

6. UPS has approximately 1.8 million shipping customers. It operates out of more than 1,700 operating facilities, and services 45,000 drop boxes for urgent letters and small packages. UPS operates a fleet of approximately 88,000 ground vehicles, and an air fleet of 269 jet aircraft (plus 313 chartered aircraft). Together, these aircraft serve 385 domestic airports and fly almost 1000 daily flight segments. UPS has more than 350,000 employees worldwide. More than 20,000 independently-owned shipping service centers also offer to ship packages for consumers using UPS services.

C. Shipping A Package By UPS.

7. There are various types of UPS shippers. For example, there are:

- account holders that receive daily pick-ups by a UPS driver;

- occasional shippers that call to request one-time pick-ups, or use the Internet to request on-call pick-ups, by a UPS driver;
- occasional Internet-based shippers that may hand their packages to any UPS driver that they see;
- occasional shippers who bring their packages to a UPS customer counter;
- occasional shippers who bring their packages to an independently-owned shipping service center, such as a UPS Store or Mail Boxes Etc. center; and
- shippers who make shipments by placing their packages in a UPS drop box.

8. With respect to packages shipped within the United States, shippers generally pack their own parcels and complete a shipping record that identifies the consignee's (recipient's) name and address, the weight of the package, and the number of packages. UPS shipping records and systems do not ask shippers from whom UPS picks up on a regular basis to identify the contents of packages traveling within the United States (except where shippers indicate that their packages contain hazardous materials – as defined and required by the United States Department of Transportation). While UPS has the right to open and inspect packages in its system, in the normal course of business, this action generally happens infrequently, such as when there is reason to suspect some violation of our Hazardous Materials Compliance Program procedures might be occurring or we have information that the package(s) might otherwise present some risk to our employees, customers or the general public.

9. UPS's Terms and Conditions of Service require shippers to ensure that a shipment tendered to UPS does not violate any federal, state, provincial, or local laws or regulations applicable to the shipment. UPS does not permit shippers to transport alcoholic beverages to states that prohibit or restrict such transportation. UPS does not ordinarily make an independent determination about whether a shipper or consignee is licensed by a state.

D. UPS's Transportation Services Depend on Uniformity, Efficiency, Speed, and Reliability.

10. UPS's delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities, ground fleet, and, air fleet. UPS's transportation and distribution networks are engineered in great detail to provide speed, reliability, and efficiency. Those networks are based on uniformity – that is, repetition of the same processes and procedures for the documentation of packages, pick up of packages from shippers, and delivery to consignees, for all packages regardless of their destination – because uniformity leads to superior, reliable services to shippers and their consignees, and is essential to UPS's survival in a highly competitive industry. Uniformity of operations and processes and efficiency keep down a UPS's overall costs, and therefore affect the prices that UPS charges.

11. UPS is widely regarded as one of the most efficient organizations in the world. This efficiency is due in large part to the uniformity described herein. UPS's system leads not only to superior, reliable services to shippers and their consignees, it is essential to UPS's price competitiveness in a highly competitive industry with

numerous competitors, including the United States Postal Service, which has its parcel business subsidized by its monopoly on first class mail. In the highly competitive cargo transportation business, carriers stake their reputations on the prompt and efficient delivery of packages because customers judge carriers by their efficiency, price, and service.

12. UPS uses a "hub-and spoke" system, which consists of an extensive network of sorting facilities located throughout the country (and the world) that generally works as follows:

- a shipper provides delivery information on UPS's shipping form or through an electronic shipping system (i.e., a computer running UPS-supplied or UPS-approved software, or a computer connected to UPS's shipping web site);
- the package enters UPS's system through a package car driver pick-up (including a pick-up from an intermediary shipping outlet such as a Mail Boxes Etc. center or pick-up from a UPS drop-box), or through UPS's customer counter;
- the package car driver brings the picked-up packages back to a local operating center;
- the packages are unloaded and placed on conveyor belts for sorters to separate them based on delivery location and the delivery time commitment;
- feeder vehicles and, in some cases, airplanes and trains take packages from the centralized hubs to other hubs for further sorting, and ultimately to local centers for delivery; and

- at the local center, packages are further sorted and loaded onto package cars for delivery based on each consignee's address.

13. To comply with federal laws and UPS policy, UPS requires customers tendering certain packages, such as those containing hazardous materials, to meet specific nationally-uniform identification (and other) requirements that do not vary by state of destination. Under its standard procedures, UPS preloaders do not have to search for or read text on a package in order to identify it as requiring special handling, except to the extent such text might appear on such a nationally uniform identifying sticker.

14. UPS offers numerous types of shipping services, which vary, among other things, by scheduled delivery time. For example, and by way of general description:

- UPS Sonic Air® offers same-day delivery;
- UPS Next Day Air Early A.M.® offers next-day delivery by 8:30 a.m. to most locations,
- UPS Next Day Air® offers next-day delivery by 10:30 a.m. to most locations;
- UPS Next Day Air Saver® offers next-day service by the end of the day;
- UPS 2nd Day Air A.M.® offers delivery before noon on the second business day;
- UPS 2nd Day Air® offers delivery before the end of the second business day;
- UPS 3 Day Select® offers delivery by the end of the third business day; and

- UPS Ground offers delivery by the end of the promised day (which depends on the shipping distance).

15. UPS guarantees delivery at a time and date certain after a package has been picked up, and if a package is not timely delivered, UPS will, on request and subject to certain conditions, provide a full refund or credit of the shipping charges.

16. In order to meet its delivery deadlines, UPS must avoid even minor delays. Delays or disruptions at any point in UPS's operations can affect thousands of packages in transit. For example, since no truck can leave an operating center until the sorting and loading process is completed, delays of just a few minutes in the sorting and loading can cause UPS to miss guaranteed delivery commitments for packages on every truck being loaded.

I. FACTS REGARDING HOW UPS COMPLIES 22 M.R.S.A. § 1555-D.

A. Operational Effects Of Complying With Section 1555-D.

17. Because, in accordance with Section 1555-D, a person is deemed to know that a package marked in accordance with Section 1555-C(3)(B) contains tobacco products, in order to comply with Section 1555-D, UPS must take steps (1) to identify packages bound for delivery in Maine that are marked as containing tobacco products and (2) to ensure that such packages are not delivered in violation of Section 1555-D.

18. In order to identify packages bound for delivery in Maine that are marked in accordance with Section

1555-C(3)(B), as is necessary to comply with Section 1555-D, UPS instructs its preloaders (who load package cars for deliveries) to devote extra time to visually scan the six-sided exterior of every package to be delivered in Maine in order to determine if the shipper has marked the package with text indicating that the package contains tobacco products.

19. UPS preloaders would not ordinarily visually scan the six-sided exterior of packages to search for or read text that does not appear on a package's label (or a nationally uniform identifying sticker). Not having preloaders inspect or otherwise determine the contents of packages, or visually scan the six-sided exterior of packages to search for and read text, permits UPS to streamline package handling and avoid interruptions and delays.

20. UPS also instructs those preloaders to read the consignee's and shipper's names on the label of every package to be delivered in Maine to determine if the names suggest that the package may contain tobacco products. In the absence of the statutory requirements, preloaders normally would not have to read and consider a shipper's name, and only occasionally would have to read a consignee's name. Having to read shipper and consignee names on every package adds delay to a preloader's tasks.

21. Having preloaders determine whether a package is indicated to contain a tobacco products in the manner described above materially adds to the processing and sorting time for every package processed for delivery in Maine.

22. For every package that is bound for delivery in Maine and is marked as containing a tobacco product in

accordance with Section 1555-C(3)(B), or that has a shipper or consignee name that indicates that the package likely contains tobacco products, UPS removes the package from the normal transportation and delivery procedures, to have its personnel research whether the consignee is licensed in Maine as a tobacco distributor or retailer.

23. According to the lists that the Maine Attorney General's office provided to UPS, there are more than 2,600 licensed tobacco retailers in Maine, and approximately 40 licensed tobacco distributors in Maine.

24. Determining whether the consignee of a tobacco products package is a licensed retailer or distributor materially adds to the processing and sorting time for such packages.

25. If UPS determines that the consignee of such a tobacco products package is not licensed as a tobacco retailer or distributor in Maine, then UPS arranges to have the package returned to the shipper. If the shipper of such a package is located in Maine but is not a licensed distributor or retailer, a return-to-sender delivery itself would violate Section 1555-D. In such circumstances, UPS has to contact the shipper and ask that the shipper retrieve the package from UPS, or failing that, to otherwise dispose of the package.

26. Returning an undeliverable tobacco products package to its shipper, or otherwise arranging for its disposition materially adds to UPS's costs of handling such packages.

27. But for Section 1555-D, UPS would not have to use extra procedures to identify packages for Maine

consignees containing tobacco products and to determine whether they can be delivered.

B. Additional Effects Of Complying With Section 1555-D.

28. Implementing procedures for dealing with packages marked as containing a tobacco product in accordance with Section 1555-C(3)(B), or otherwise indicated to contain tobacco products, requires that UPS provide special training to its preloaders and drivers in (1) performing six-sided visual scans, (2) recognizing packages marked or otherwise indicated to contain tobacco products, and (3) removing such packages from the sort for special handling. Implementing procedures for dealing with packages believed to contain a tobacco product requires that UPS provide special training to personnel assigned the task of researching whether the consignee of such packages is licensed as a tobacco distributor or retailer in Maine.

29. But for Section 1555-D, carriers would not have to undertake any of the extra training set forth above. Undertaking the specialized training set forth above increases UPS's cost of conducting business.

II. FACTS REGARDING HOW UPS LAWFULLY COULD BE UTILIZED TO MAKE DELIVERIES OF TOBACCO PRODUCT DELIVERY SALES PURSUANT TO 22 M.R.S.A § 1555-C.

A. UPS's "Delivery Confirmation Adult Signature Required" Service Does Not Meet The Requirements Of Section 1555-C(3)(C).

30. UPS offers shippers the opportunity to specify that designated shipments can only be delivered to an

adult 21 years of age or older; this service is known as "Delivery Confirmation Adult Signature Required" ("DCASR"). UPS's shipper must request DCASR at the time of shipment, and must pay an additional fee, which is presently $2.75 (comprised of a $1.00 surcharge for delivery confirmation and a $1.75 additional charge for the adult signature requirement).

31. In relevant part, the DCASR service is described in UPS's Terms and Conditions as follows:

> Delivery Confirmation Adult Signature Required – A shipper may request UPS to obtain the signature of an adult 21 years of age or older and to include it in the Delivery Confirmation response. An additional charge, set forth in the UPS Rates applicable to the shipment in effect at the time of shipping, will be assessed. UPS, in its sole discretion, will determine if delivery can be completed when such a request is made, and may request photo identification indicating the recipient's age, before completing delivery.

32. When a UPS shipper requests DCASR on a particular package, the fact that the shipper has requested this service typically is embedded in a "smart" label attached to the package – i.e., a label that, when electronically scanned by a delivery employee, can convey embedded information or alerts. In general, shippers who use UPS-supplied or UPS-approved electronic shipping systems can generate and affix smart shipping labels to packages before they are tendered to UPS. At the time of delivery, the UPS service provider then receives a prompt on his or her DIAD device (the clipboard computer that drivers carry), which instructs the service provider to

deliver only to an adult age 21 or older, and to obtain the signature of the adult who receives the package.

33. The UPS service provider may deliver a DCASR-designated package to, and obtain the confirmation signature from, any adult at the delivery address who is age 21 or older; the signature is not required to be from the named addressee. Thus, for example, when DCASR has been requested, UPS is free to deliver to, and obtain a confirming signature from, a mail room attendant or receptionist of appropriate age who is at the delivery address. Because UPS is free to deliver to any adult at the delivery address, UPS does not require that shippers who request the DCASR service provide UPS with the named addressee's actual age.

34. In completing the delivery of a package on which DCASR has been requested, the UPS Service Provider does not necessarily obtain photo identification to confirm the age of the person accepting delivery. If the Service Provider in his or her discretion suspects that the person may be younger than 21, then he or she would request identification.

35. Once the delivery has been completed, UPS sends the shipper a notice, in a printed or electronic format, confirming the delivery.

B. To Satisfy § 1555-C(3)(A), UPS Would Have To Receive The Age Of The Purchaser.

36. Under Section 1555-C(3)(A), in connection with Maine-bound delivery sales of tobacco products, a tobacco retailer is required to provide to the delivery service the age of the purchaser.

37. UPS uses standardized paper shipping forms and/or standardized electronic shipping systems to collect information about each shipment it carries, but does not include a field on its forms or in its systems in which the addressee's age could be recorded, and does not otherwise collect consignee age information from its shippers.

38. In order to give shippers of Maine-bound, tobacco-product delivery sales the opportunity to identify the age of their purchasers/consignees in the most effective manner, UPS would have to revise its customer shipping systems and its standardized paper shipping forms used anywhere in the world for shipments to or within the United States to provide a field for the shipper to provide such information, and would have to modify, on a worldwide basis, the information systems that it uses to receive and process package information to provide for that additional field of data.

39. Alternatively, UPS would have to devise another method of recording that information, such as by requiring shippers of Maine-bound tobacco product delivery sales to mark the consignee's age on the package at the same place where the package is marked as containing a tobacco product pursuant to Section 1555-C(3)(B).

C. To Satisfy § 1555-C(3)(C)(3), UPS Would Have To Create A New Service That Promised Different Identification Checks.

40. In accordance with Section 1555-C(3)(C), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require checking the identification of any consignee under the age

of 27 before making delivery to ensure that the consignee is of legal age (at least 18) to receive tobacco products.

41. UPS's Delivery Confirmation Adult Signature Required Service does not require checking the identification of any consignee under the age of 27 before making delivery. UPS's Delivery Confirmation Adult Signature Required Service does not allow deliveries to persons who are between the ages of 18 and 20.

42. In the UPS system, the best way to alert a delivery employee that a consignee identification check is required would be to embed such information in a smart shipping label. In order to offer shippers the ability to generate smart labels reflecting the requirements of Section 1555-C(3)(C), all UPS-supplied and UPS-approved electronic shipping systems would have to be re-engineered to recognize and embed an alert for each package that (1) is bound for an address in Maine; (2) contains tobacco products as defined by the Maine statute; and (3) is bound to an addressee who is 18 to 26 years old. UPS also would have to re-engineer its DIAD devices and supporting information systems to read and recognize such an alert.

43. In the absence of smart labels, if UPS required that shippers of tobacco products to Maine write the age of the addressee on the package at the same place where they mark the package as a tobacco product shipment pursuant to Section 1555-C(3)(B), or if UPS otherwise first learned that a package contained a tobacco product when preloaders performed a six-sided visual scan and detected a marking made in accordance with Section 1555-C(3)(C), then UPS would have to devise a method for the employees who research the deliverability of such packages also to

alert the delivery person to perform the identification check, such as by creating a special stamp or label to be affixed on approved packages.

D. To Satisfy § 1555-C(3)(C)(1) & (2), UPS Would Have To Create A New Service That Promised Delivery To, And A Confirming Signature From, Only The Named Addressee.

44. In accordance with Section 1555-C(3)(C)(1) and (2), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require that shipments of such packages be addressed to, and signed for personally by, the purchaser.

45. UPS's Delivery Confirmation Adult Signature Required Service does not require personal delivery to, and confirming signature from, only the named consignee – as opposed to a mail room attendant, receptionist, or any other person at the delivery address or, upon request, to any adult at the delivery address.

46. Delivering a package exclusively to, and obtaining a delivery signature exclusively from, the named addressee would considerably expand the amount of time that a UPS delivery person would have to spend at a delivery stop.

47. Because Section 1555-C(3)(C) requires that a consumer who purchases a delivery-sale of tobacco products personally sign for the delivery, UPS expects that consumers who work outside the home during the typical work day (when UPS makes its deliveries) will either have to direct those shipments to their workplace or make arrangements to be home at the anticipated time for the

delivery. In the typical workplaces where UPS makes deliveries, a designated employee or type of employee usually is assigned the task of receiving cargo deliveries, such as a mail room attendant or receptionist. But in Maine, UPS would not be able to deliver tobacco product delivery sales to such third parties, but instead would have to ask that person to contact the addressee and ask the addressee to come to the delivery area.

48. Based on my 20 years experience working with UPS, including as a driver, and my knowledge of the personal and work habits of my friends, family and co-workers, I believe that, in some instances when UPS would attempt a workplace delivery of a tobacco product delivery sale in Maine, the consignee and the delivery area will be located in different buildings, or on different floors of the same building. In some instances, the consignee may be on the phone or have stepped away momentarily from his or her workstation or might otherwise be unavailable to come to the delivery area. In some instances, it could take several minutes just to determine that the consignee is not even available to sign, in which case the process would have to be repeated the next day. Many classes of workers rarely (if ever) would be available to sign for such a package at a fixed address – such as truck drivers, police officers, construction workers, repair workers, and traveling sales representatives – and UPS might have to make repeated, futile attempts to deliver such packages to such people.

49. When a delivery is to be made to a residence, the addressee may not be at home at the time that the delivery person attempts the delivery, even if another adult is present at the residence.

50. Attempting to deliver a package only to the named addressee could cause substantial delays on a delivery employee's delivery route, and thus threaten the timely delivery of other packages on the employee's route. In many cases, UPS likely would have to arrange to return packages containing delivery sales of tobacco products to the sender because it would be unable to make a successful delivery to the addressee.

51. To impose a specific requirement on its shippers that Maine-bound packages containing delivery sales of tobacco products (1) be addressed to the purchaser and (2) be shipped only to purchasers of legal age to purchase tobacco products, UPS would have to alter, on a worldwide basis, its contractual and related documents that contain the terms and conditions of its service.

52. To develop package delivery routes within a particular area, UPS conducts time studies to determine, on average, how long the driver will require at delivery stops and how long the driver will require between delivery stops. UPS relies on those time studies to create delivery routes in which, given known or expected package volumes, drivers can complete all assigned package deliveries on their routes within the delivery deadlines for such packages. To increase efficiency, UPS relies on its time studies and historical data and puts drivers on the road only as required by the package volume for a particular day. The time required to complete a delivery stop that required delivery only to the named addressee (or to determine that such a delivery could not be completed) could vary widely – from a few seconds to several minutes – depending on the proximity and availability of the consignee at the time of delivery. If UPS were to offer such a service, it conceivably would have to

dispatch additional delivery routes to offset the increased delivery time of such packages.

53. UPS determined that it is not practical for it to offer a service that guarantees delivery only to the named addressee because doing so would cause drivers to spend too much time per stop, would threaten on-time delivery of packages on a driver's route, and/or would force UPS to use more drivers per package, on modified routes, and thereby raise operating costs and prices.

54. If making personal deliveries of tobacco product delivery sales caused UPS drivers in Maine to have their workdays extended by one half hour, UPS would incur additional annual operating expenses of approximately $1.8 million – $60,000 annually for each additional workday minute.

III. UPS'S DETERMINATION THAT IT WOULD BE TOO BURDENSOME AND COSTLY TO ALTER ITS SERVICES TO MAKE ALL PERMISSIBLE DELIVERIES OF TOBACCO PRODUCTS ALLOWED BY THE CHALLENGED PROVISIONS.

55. UPS examined how it could best comply with the Challenged Provisions' restrictions that (1) allow deliveries of tobacco products to persons other than licensed retailer or distributors, but only if the shipper of such a package is a licensed retailer, and (2) provide that a carrier is deemed to know that a package contains tobacco products if it is received from a person on the Attorney General's list of unlicensed tobacco retailers.

56. To the extent that known unlicensed shippers were UPS account holders who receive daily pick-ups, UPS

determined that the least disruptive way to recognize their packages that were transported to Maine for delivery would be to specially process such shippers' packages at the point of origin into UPS's transportation system. Shippers on the Attorney General's list of known unlicensed shippers could contain retailers located in any of the 50 states, and could contain retailers located outside of the United States and, thus, could require that UPS institute such special procedures throughout its operations, not just in Maine. Moreover, known unlicensed shippers potentially could avoid UPS's special processing of their Maine-bound packages by introducing them to UPS's system through a storefront shipping outlet such as a Mail Boxes Etc. center.

57. UPS concluded that the only way that UPS could ensure that it was not delivering packages in Maine from known unlicensed tobacco would be to research every package to be delivered in Maine to determine if the shipper was on the list of known unlicensed shippers. The time and effort required to conduct such research would have a tremendous adverse impact on UPS's operations, and would have slowed all UPS deliveries in Maine to a near standstill.

58. UPS determined that, for at least three reasons, as of the effective date of the Challenged Provisions, it could no longer feasibly deliver tobacco products in Maine except to licensed retailers and distributors: (1) efforts to identify all Maine-bound shipments from shippers on the list of known unlicensed shippers would be too disruptive of UPS operations in and outside of Maine, and would not always be effective; (2) UPS offered no service that met Section 1555-C's manner-of-delivery requirements for tobacco product delivery sales, so UPS could not lawfully

be hired to make such deliveries to consumers; and (3) UPS determined that it would be operationally impractical to implement new services and procedures that would comply with Section 1555-C's manner-of-delivery requirements because such services and procedures likely would be costly to design and implement, and likely would have been disruptive to UPS's Maine delivery operations. In light of these extreme burdens, UPS concluded that the only possible way that it could make lawful deliveries of tobacco products to Maine would be to make deliveries only to licensed retailers and distributors and not to any other lawful consignee.

59. On September 10, 2003, UPS sent letters to its United States customers known or believed to be shippers of tobacco products, in which UPS notified them that, as of September 13, 2003, UPS would no longer accept any tobacco products shipments to the State of Maine except to recipients who are licensed tobacco distributors or retailers. A true and correct copy of that letter is attached hereto as Exhibit B.

60. UPS took steps to train its personnel in Maine – a total of approximately 600 employees – to comply with Section 1555-D and to reflect the change in UPS's policy regarding the delivery of tobacco products only to licensed retailers and distributors in the State of Maine. Specifically, UPS's training efforts consisted of the following steps:

- UPS made available to each of its operating centers in Maine lists of current licensed tobacco retailers and licensed distributors in Maine, to whom packages containing tobacco products may lawfully be delivered;

- UPS disseminates updated lists of licensees to its operating centers in Maine, as updates become available;
- UPS instructed every operating center in Maine to establish procedures for all pre-loaders and drivers to ensure that they do not load or deliver packages containing tobacco products to unlicensed Maine consignees;
- On September 12, 2003, every business center in Maine dedicated its morning meeting with all preloaders and drivers of UPS delivery vehicles (before the loading and delivery of packages to be delivered that day) to the new procedures for Maine tobacco products;
- At that meeting, preloaders and drivers were briefed on each business center's procedures for ensuring that no package containing tobacco products is delivered to unlicensed consignees in Maine; specifically, preloaders and drivers were taught: (i) what constitutes a "tobacco product" under Maine law; (ii) how to identify packages that the preloader or driver knows or believes may contain tobacco products destined for addresses in Maine; (iii) how to determine whether a package containing tobacco products is destined for licensed consignee in Maine; and (iv) in the event that a package containing tobacco products is destined for an unlicensed consignee in Maine, to return the package for redelivery to the sender, to hold the package for pick-up by the sender or to destroy the package.

- To date, there have been two additional follow-up trainings to existing employees; in addition, training is given to all new preloader and driver hires.

61. UPS adopted its policy of delivering packages containing tobacco products only to licensed consignees in Maine to avoid the disruption and burden on UPS's operations caused by the Challenged Provisions, but UPS's policy has not eliminated such disruption and burden altogether.

62. UPS's compliance with Section 1555-D, through the operations procedures and training methods summarized above, continues to burden UPS with the costs and operational requirements involved in the following compliance efforts, among others: (i) maintaining and disseminating current lists of licensed consignees; (ii) training its personnel to follow the procedures UPS has enacted to comply with Section 1555-D; (iii) having preloaders and drivers identify packages that do or may contain tobacco products; (iv) having personnel research the addressees of such packages to determine whether the package may be delivered consistent with UPS's policy; and (v) returning or otherwise disposing of packages containing tobacco products that are destined for unlicensed consignees.

63. UPS has estimated that identifying packages that may contain tobacco products has added approximately two seconds to the processing time of each of the approximately 65,000 packages that UPS process for delivery in Maine each day, at a cost to UPS of approximately $12,000 per month. My own review of UPS time study benchmarks corroborates that approximately two seconds per package could be added to the time spent

by a UPS preloader following the methods described above. Based on established time studies for analogous look-up tasks, UPS estimates that, when packages are identified to contain tobacco products, it costs UPS approximately $2 per identified package to research whether the consignee is a licensed retailer or distributor.

64. In addition to the costs UPS has incurred in the course of ensuring its compliance with Section 1555-D, UPS has lost revenue as a result of turning away business that it lawfully could deliver even after the Challenged Provisions became effective, namely, tobacco product shipments to Maine from retailers licensed by Maine.

IV. PROPOSED RULES ISSUED BY THE MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES.

65. I am informed and believe that, on July 27, 2004, the Maine Department of Health and Human Services proposed rules relating to the Challenged Provisions.

66. The only item in the proposed rule that would affect the burdens set forth in this declaration relates to placement of the marking made in accordance with Section 1555-C(3)(B) indicating that a package contains tobacco products. If the proposed rules become effective in their present form, UPS would be deemed to know that a package contained tobacco products if a marking made in accordance with Section 1555-C(3)(B) appeared on any of the six sides of a package other than the side opposite the label. As a result, UPS would have to conduct five-sided visual scans of all packages to be delivered in Maine to search for and read text that may constitute such a

marking, but not six-sided scans. In all other respects, the burdens placed on UPS would remain unchanged.

67. This minor change affecting only a single aspect of UPS's compliance efforts would have only a minimal effect on UPS. If the proposed rules become effective in their present form, the Challenged Provisions still would slow and disrupt UPS's delivery operations in Maine.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed in Atlanta, Georgia on August ___, 2004.

/s/ Debra Meisel
Debra Meisel

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant.	CIVIL ACTION NO.: 03-CV-178-B-DBH

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56(c), defendant, Maine Attorney General G. Steven Rowe, hereby submits its statement of material facts in opposition to plaintiff's motion for summary judgment. Defendant hereby responds to each fact set forth in plaintiff's statement of facts and submits certain additional facts. In responding to plaintiff's statement of facts, defendant, by admitting, denying or qualifying the facts, does not concede that any of the facts are material.

Response to Plaintiff's Statement of Facts

* * *

4.: UPS delivers approximately 13.6 million packages per day, including approximately 65,000 packages per day in Maine. (Meisel Decl. ¶ 4; Meisel Dep. at 82:24, 87:23-88:5, Deposition of John Butler, attached as Exhibit F to the Declaration of Ameri R. Giannotti In Support Of Plaintiffs' "As Applied" Motion For Summary Judgment, filed herewith ("Butler Dep.") at 57:15-17, 81:7-13.)

***Response*: Admit.**

5.: In addition to operating as a motor carrier, one of UPS's operating entities, UPS Co., is authorized by the Federal Aviation Administration to operate as an air carrier for the transportation of property. Even where UPS operates as an air carrier, it uses ground vehicles to make its deliveries. (Meisel Decl. ¶ 5.)

***Response*: Admit.**

6.: UPS's delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities, ground fleet, and, air fleet. (Meisel Decl. ¶ 10; Meisel Dep. at 78:23-79:10, 117:10-19.)

***Response*: Admit.**

7.: UPS's transportation and distribution networks are engineered in great detail to provide speed, reliability, and efficiency. Those networks are based on uniformity – that is, repetition of the same processes and procedures for the documentation of packages, pick up of packages from shippers, and delivery to addressees, for all packages regardless of their destination – because uniformity leads to superior, reliable services to shippers and their addressees,

and is essential to UPS's survival in a highly competitive industry. In the highly competitive cargo transportation business, carriers stake their reputations on the prompt and efficient delivery of packages because customers judge carriers by their efficiency, price, and service. (Meisel Decl. ¶ 10; Meisel Dep. at 22:21-23:2, 80:19-25, 89:2-8.)

***Response*: Admit.**

8.: Uniformity of operations and processes and efficiency keep down a UPS's overall costs, and therefore affect the prices that UPS charges. (Meisel Decl. ¶ 10.)

***Response*: Admit.**

9.: UPS uses a "hub-and spoke" system, which consists of an extensive network of sorting facilities located throughout the country (and the world) that generally works as follows:

- a shipper provides delivery information on UPS's shipping form or through an electronic shipping system (i.e., a computer running UPS-supplied or UPS-approved software, or a computer connected to UPS's shipping web site);
- the package enters UPS's system through a package car driver pick-up (including a pick-up from an intermediary shipping outlet such as a Mail Boxes Etc. center or pick-up from a UPS drop-box), or through UPS's customer counter;
- the package car driver brings the picked-up packages back to a local operating center;
- the packages are unloaded and placed on conveyor belts for sorters to separate them based on delivery location and the delivery time commitment;

- feeder vehicles and, in some cases, airplanes and trains take packages from the centralized hubs to other hubs for further sorting, and ultimately to local centers for delivery; and
- at the local center, packages are further sorted and loaded onto package cars for delivery based on each recipient's address.

(Meisel Decl. ¶ 12.)

***Response*: Admit.**

10.: UPS guarantees delivery at a time and date certain after a package has been picked up, and if a package is not timely delivered, UPS will, on request and subject to certain conditions, provide a full refund or credit of the shipping charges. (Meisel Decl. ¶ 15; Meisel Dep. at 271:24-272:15.)

***Response*: Admit.**

11.: In order to meet its delivery deadlines, UPS must avoid even minor delays. Delays or disruptions at any point in UPS's operations can affect thousands of packages in transit. For example, since no truck can leave an operating center until the sorting and loading process is completed, delays of just a few minutes in the sorting and loading can cause UPS to miss guaranteed delivery commitments for packages on every truck being loaded. (Meisel Decl. ¶ 16; Meisel Dep. at 79:1-10, 82:19-83:12, 186:20-21.)

***Response*: Qualified.** UPS's time projections for preloaders to complete their job is based upon historical data, which inherently includes delays associated with non-deliverable packages. *Meisel Dep.*, at 113:6-114:3. Further, UPS's time projections for drivers are also based on real

life historical data, which inherently includes various types of delays. *Meisel Dep.*, at 184:6-20. Finally, UPS's services can be delayed by a number of factors, including weather, fluctuating volume, equipment breakdown, employee absences, customer contact, waiting for elevators, and waiting to obtain signatures. *Meisel Dep.*, at 83:13-84:7; 184:21-185:9.

12.: For packages shipped in the United States, UPS shippers generally pack the parcel, and complete a shipping record that identifies the addressee, the weight of the package, and the number of packages. (Meisel Decl. ¶ 8; Meisel Dep. at 89:18-90:13.)

***Response*: Admit.**

13.: UPS shipping records and systems do not ask shippers from whom UPS picks up on a regular basis to identify the contents of packages traveling within the United States (except under special circumstances, such as where shippers indicate that their packages contain hazardous materials – as defined and required by the United States Department of Transportation). While UPS has the right to open and inspect packages in its system, in the normal course of business, this action generally happens infrequently, such as when there is reason to suspect some violation of our Hazardous Materials Compliance Program procedures might be occurring or it has information that the package(s) might otherwise present some risk to our employees, customers or the general public. (Meisel Decl. ¶ 8.)

***Response*: Deny.** The document that the customer prepares to ship a package provides a place to disclose the package's contents. *Butler Dep.*, at 79:17-20; *Meisel Dep.*, at 32:24-33:3.

14.: To comply with federal laws and/or UPS policy, UPS requires certain packages, such as those containing hazardous materials, to meet specific nationally-uniform identification (and other) requirements that do not vary by state of destination. (Meisel Decl. ¶ 13.)

***Response*: Admit.**

15.: Under its standard procedures, UPS preloaders do not have to search for or read text on a package in order to identify it as requiring special handling, except to the extent such text might appear on such a nationally-uniform identifying sticker. (Meisel Decl. ¶ 13.)

***Response*: Deny.** Preloaders inspect the packages for markings, and also to determine the delivery addresses. *Meisel Dep.*, at 54:7-17. Preloaders are trained to notice and segregate many types of non-deliverable packages, all of which require them to spend additional time with a particular package. *Meisel Dep.*, at 112:2-113:5.

16.: UPS's Terms and Conditions of Service require shippers to ensure that a shipment tendered to UPS does not violate any federal, state, provincial, or local laws or regulations applicable to the shipment. (Meisel Decl. ¶ 9; Meisel Dep. at 114:25-115:3.)

***Response*: Admit.**

17.: UPS does not permit shippers to transport alcoholic beverages to states that prohibit or restrict such transportation. UPS does not ordinarily make an independent determination about whether a shipper or addressee is licensed by a state. (Meisel Decl. ¶ 9; Meisel Dep. at 114:21-115:10.)

***Response*: Qualifed.** The UPS pickup driver would not know if it was legal to deliver alcohol in the destination state. *Meisel Dep.*, at 204:14-19. Instead, UPS would likely discover that the alcohol was non-deliverable in the destination state and either dispose of or return the package. *Meisel Dep.*, at 205:1-7.

18.: Because, in accordance with Section 1555-D, a person is deemed to know that a package marked in accordance with Section 1555-C(3)(B) contains tobacco products, in order to comply with Section 1555-D, UPS must take steps (1) to identify packages bound for delivery in Maine that are marked as containing tobacco products and (2) to ensure that such packages are not delivered in violation of Section 1555-D. (Meisel Decl. ¶ 17.)

***Response*: Admit.**

19.: Presently, and at all times since the Challenged Provisions were enacted, a marking made in accordance with Section 1555-C(3)(B) lawfully could appear on any of the six sides of a boxed package. 22 M.R.S.A. § 1555-C.

***Response*: Admit.**

20.: In order to identify packages bound for delivery in Maine that are marked in accordance with Section 1555-C(3)(B), as is necessary to comply with Section 1555-D, UPS instructs its preloaders (who load package cars for deliveries) to devote extra time to visually scan the six-sided exterior of every package to be delivered in Maine in order to determine if the shipper has marked the package with text indicating that the package contains tobacco products. (Meisel Decl. ¶ 18; Meisel Dep. at 105:25-106:20; Butler Dep. at 31:19-32:11, 94:15-95:2.)

***Response*: Qualified.** Preloaders are already inspecting packages for markings. *Meisel Dep.*, at 54:7-17.

21.: UPS preloaders would not ordinarily visually scan the six-sided exterior of packages to search for or read text that does not appear on a package's label (or a nationally-uniform identifying sticker). (Meisel Decl. ¶ 19; Meisel Dep. at 103:12-24.)

***Response*: Deny.** Preloaders inspect the packages for markings, and also to determine the delivery addresses. *Meisel Dep.*, at 54:7-17. Preloaders are trained to notice and segregate many types of non-deliverable packages, all of which require them to spend additional time with a particular package. *Meisel Dep.*, at 112:2-113:5.

22.: Not having to inspect or otherwise determine the contents of packages, or visually scan the six-sided exterior of packages to search for and read text, permits UPS to streamline package handling and avoid interruptions and delays. (Meisel Decl. ¶ 19; Meisel Dep. at 105:6-15.)

***Response*: Qualified.** Preloaders already do inspect packages for markings, to determine the delivery address, and to segregate many types of non-deliverable packages. *Meisel Dep.*, at 54:7-17; 112:2-113:5.

23.: UPS also instructs those preloaders to read the addressee's and shipper's names on the label of every package to be delivered in Maine to determine if the names suggest that the package may contain tobacco products. (Meisel Decl. ¶ 20.)

***Response*: Admit.**

24.: In the absence of the statutory requirements, preloaders normally would not have to read and consider a

shipper's name, and only occasionally would have to read a addressee's name. Having to read shipper and addressee names on every package adds delay to a preloader's tasks. (Meisel Decl. ¶ 20.)

***Response*: Qualified.** UPS has done no operational study to ascertain whether there is such a delay or, if so, the magnitude of that delay. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1.

25.: Determining whether a package is marked as containing a tobacco product in accordance with Section 1555-C(3)(B), and whether its shipper's or addressee's name indicates that the package likely contains tobacco products, materially adds to the processing and sorting time for all packages processed for delivery in Maine. (Meisel Decl. ¶ 21; Meisel Dep. at 108:5-23, 122:1-8; Butler Dep. at 31:19-32:11, 88:2-14.)

***Response*: Deny.** UPS has done no operational study to ascertain whether there is such a delay or, if so, the magnitude of that delay. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1.

26.: For every package that is bound for delivery in Maine and is marked as containing a tobacco product in accordance with Section 1555-C(3)(B), or that has a shipper or addressee name that indicates that the package likely contains tobacco products, UPS removes the package from the normal transportation and delivery procedures, to have its personnel research whether the addressee is licensed in Maine as a tobacco distributor or retailer. (Meisel Decl. ¶ 22; Meisel Dep. at 105:25-106:20; Butler Dep. at 94:9-95:2.)

***Response*: Admit.**

27.: There are more than 2,600 licensed tobacco retailers in Maine. (Meisel Decl. ¶ 23.)

***Response*: Admit.**

28.: There are approximately 40 licensed tobacco distributors in Maine. (Meisel Decl. ¶ 23.)

***Response*: Admit.**

29.: Determining whether the addressee of a tobacco products package is a licensed retailer or distributor materially adds to the processing and sorting time for such packages. (Meisel Decl. ¶ 24.)

***Response*: Deny.** Although UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages. *Meisel Dep.*, at 122:13-123:13. UPS had intercepted thirty-three (33) packages destined for a Maine consumer that UPS believed to contain tobacco products. *Butler Dep.*, at 52:16-17; *Meisel Dep.*, at 190:20-25. UPS does not know how many packages have been intercepted, researched, and determined to be deliverable. *Meisel Dep.*, at 192:21-25.

30.: If UPS determines that the addressee of such a tobacco products package is not licensed as a tobacco retailer or distributor in Maine, then UPS arranges to have the package returned to the shipper. (Meisel Dep. ¶ 25; Butler Dep. at 95:4-22.)

***Response*: Admit.**

31.: If the shipper of such a package is located in Maine but is not a licensed distributor or retailer, then a return-to-sender delivery itself would violate Section 1555-D. In

such circumstances, UPS has to contact the shipper and ask that the shipper retrieve the package from UPS, or failing that, to otherwise dispose of the package. (Meisel Decl. ¶ 25; Butler Dep. 95:4-22.)

***Response*: Admit.**

32.: Returning an undeliverable tobacco products package to its shipper, or otherwise arranging for its disposition materially adds to UPS's costs of handling such packages. (Meisel Decl. ¶ 26.)

***Response*: Deny.** Although UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages. *Meisel Dep.*, at 122:13-123:13. In addition, in the regular course of its business UPS does not charge an additional fee when it has to return a non-deliverable package to the shipper, as it is a set service that UPS offers in all of its fees. *George Dep.*, at 60:3-12.

33.: But for Section 1555-D, UPS would not have to use extra procedures to identify packages for Maine addressees containing tobacco products and to determine whether they can be delivered. (Meisel Decl. ¶ 27.)

***Response*: Admit.**

34.: Implementing procedures for dealing with packages marked as containing a tobacco product in accordance with Section 1555-C(3)(B), or otherwise indicated to contain tobacco products, requires that UPS provide special training to its preloaders and drivers in (1) performing six-sided visual scans, (2) recognizing packages marked or otherwise indicated to contain tobacco products, and (3) removing such packages from the sort for special handling. (Meisel Decl. ¶ 28; Meisel Dep. at 154:15-155:7.)

***Response*: Deny.** The training imposed no burden on UPS because it was given at a precommunication work meeting (PCM) at UPS business centers in Maine. *Butler Dep.*, at 49:15-23. Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17. A PCM typically lasts three to five minutes. *George Dep.*, at 53:25-54:2; *Butler Dep.*, at 48:11-12.

35.: Implementing procedures for dealing with packages believed to contain a tobacco product requires that UPS provide special training to personnel assigned the task of researching whether the addressee of such packages is licensed as a tobacco distributor or retailer in Maine. (Meisel Decl. ¶ 28.)

***Response*: Deny.** The training imposed no burden on UPS because it was given at a precommunication work meeting (PCM) at UPS business centers in Maine. *Butler Dep.*, at 49:15-23. Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep* at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17. A PCM typically lasts three to five minutes. *George Dep.*, at 53:25-54:2; *Butler Dep.*, at 48:11-12.

36.: But for Section 1555-D, carriers would not have to undertake any of the extra training set forth above. (Meisel Decl. ¶ 29.)

***Response*: Deny.** Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

37.: Undertaking the specialized training set forth above increases UPS's cost of conducting business. (Meisel Decl. ¶ 29.)

***Response*: Deny.** Every morning, before each shift, UPS holds a PCM with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

38.: UPS offers shippers the opportunity to specify that designated shipments can only be delivered to an adult 21 years of age or older; this service is known as "Delivery Confirmation Adult Signature Required" ("DCASR"). (Meisel Decl. ¶ 30; Meisel Dep. at 175:3-14.)

***Response*: Admit.**

39.: UPS's shipper must request DCASR at the time of shipment, and must pay an additional fee, which is presently $2.75 (comprised of a $1.00 surcharge for delivery confirmation and a $1.75 additional charge for the adult signature requirement). (Meisel Decl. ¶ 30; Meisel Dep at 176:14-17; 179:12-14.)

***Response*: Qualified.** Kristin George testified that the fee was only $1.75. *George Dep.*, at 76:3-7; *Meisel Dep.*, at 176:14-17.

40.: In relevant part, the DCASR service is described in UPS's Terms and Conditions as follows:

> Delivery Confirmation Adult Signature Required – A shipper may request UPS to obtain the signature of an adult 21 years of age or older and to include it in the Delivery Confirmation response. An additional charge, set forth in the UPS Rates applicable to the shipment in effect at the time of shipping, will be assessed. UPS, in its sole discretion, will

> determine if delivery can be completed when such a request is made, and may request photo identification indicating the recipient's age, before completing delivery.

(Meisel Decl. ¶ 31; Meisel Dep. at 181:3-7.)

***Response*: Admit.**

41.: When a UPS shipper requests DCASR on a particular package, the fact that the shipper has requested this service typically is embedded in a "smart" label attached to the package i.e., a label that, when electronically scanned by a delivery employee, can convey embedded information or alerts. In general, shippers who use UPS-supplied or UPS-approved electronic shipping systems can generate and affix smart shipping labels to packages before they are tendered to UPS. At the time of delivery, the UPS service provider then receives a prompt on his or her DIAD device (the clipboard computer that drivers carry), which instructs the service provider to deliver only to an adult age 21 or older, and to obtain the signature of the adult who receives the package. (Meisel Decl. ¶ 32; Meisel Dep. at 58:2-19, 60:10-20, 182:20-22; Butler Dep. at 82:1-8.)

***Response*: Admit.**

42.: The UPS service provider may deliver a DCASR-designated package to, and obtain the confirmation signature from, any adult at the delivery address who is age 21 or older; the signature is not required to be from the named addressee. Thus, for example, when DCASR has been requested, UPS is free to deliver to, and obtain a confirming signature from, a mail room attendant or receptionist of appropriate age who is at the delivery

address. (Meisel Decl. ¶ 33; Meisel Dep. at 176:24-177:2, 183:5-7.)

***Response*: Admit.**

43.: Because UPS is free to deliver to any adult at the delivery address, UPS does not require that shippers who request the DCASR service provide UPS with the named addressee's actual age. (Meisel Decl. ¶ 33; Meisel Dep. at 172:23-173:7, 176:24-177:2, 183:13-15.)

***Response*: Admit.**

44.: In completing the delivery of a package on which DCASR has been requested, the UPS Service Provider does not necessarily obtain photo identification to confirm the age of the person accepting delivery. If the Service Provider in his or her discretion suspects that the person might be younger than 21, then he or she would request identification. (Meisel Decl. ¶ 34; Meisel Dep. at 182:5-14.)

***Response*: Admit.**

45.: Once the delivery has been completed, UPS sends the shipper a notice, in a printed or electronic format, confirming the delivery. (Meisel Decl. ¶ 35.)

***Response*: Admit.**

46.: Under Section 1555-C(3)(A), in connection with Maine-bound delivery sales of tobacco products, a tobacco retailer is required to provide to the delivery service the age of the purchaser. (Meisel Decl. ¶ 36.)

***Response*: Admit.**

47.: UPS uses standardized paper shipping forms and/or standardized electronic shipping systems to collect information about each shipment it carries, but does not include a field on its forms or in its systems in which the addressee's age could be recorded, and does not otherwise collect addressee age information from its shippers. (Meisel Decl. ¶ 37; Meisel Dep. at 165:17-21, 166:4-5, 167:9-10.)

***Response*: Qualified.** UPS changes its paper shipping forms generally once a year. *Meisel Dep.*, at 167:11-15. The forms are revised to reflect changes, such as new products or services or new rates. *Meisel Dep.*, at 167:20-168:7. UPS changes the fields in it computer system at least once a year to reflect the same types of changes. *Meisel Dep.*, at 167:16-168:7. UPS modifies its shipping systems a minimum of once a year, but potentially more often. *Meisel Dep.*, at 168:8-13. Those changes often include the addition of a data field. *Meisel Dep.*, at 169:5-9.

48.: In order to give shippers of Maine-bound, tobacco-product delivery sales the opportunity to identify the age of their purchasers/addressees in the most effective manner, UPS determined that it would have to revise its customer shipping systems and its standardized paper shipping forms used anywhere in the world for shipments to or within the United States to provide a field for the shipper to provide such information, and would have to modify, on a worldwide basis, the information systems that it uses to receive and process package information to provide for that additional field of data. (Meisel Decl. ¶ 38.)

***Response*: Qualified.** As a business decision, UPS elected to discontinue shipping tobacco products to consumers in Maine. *George Dep.*, at 78:3-16, 80:6-15, & Exhibit 20.

49.: Alternatively, UPS would have to devise another method of recording that information, such as by requiring shippers of Maine-bound tobacco product delivery sales to mark the addressee's age on the package at the same place where the package is marked as containing a tobacco product pursuant to Section 1555-C(3)(B). (Meisel Decl. ¶ 39.)

***Response*: Admit.**

50.: In accordance with Section 1555-C(3)(C), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require checking the identification of any addressee under the age of 27 before making delivery to ensure that the addressee is of legal age (at least 18) to receive tobacco products. (Meisel Decl. ¶ 40.)

***Response*: Admit.**

51.: UPS's Delivery Confirmation Adult Signature Required Service does not require checking the identification of any addressee under the age of 27 before making delivery. (Meisel Decl. ¶ 41.)

***Response*: Admit.**

52.: UPS's Delivery Confirmation Adult Signature Required Service does not allow deliveries to persons who are between the ages of 18 and 20. (Meisel Decl. ¶ 41.)

***Response:* Qualified.** By definition, UPS's DCASR Service also does not allow deliveries to persons under the age of 18. *Meisel Dep.*, at 173:4-7.

53.: In the UPS system, the best way to alert a delivery employee that an addressee identification check is required would be to embed such information in a smart shipping label. (Meisel Decl. ¶ 42.)

***Response:* Qualified.** Defendant admits that the use of a smart shipping label is one way to alert a delivery employee, but whether or not it is the "best" way is not a fact, but a conclusory opinion not requiring a response.

54.: In order to offer shippers the ability to generate smart labels reflecting the requirements of Section 1555-C(3)(C), all UPS-supplied and UPS-approved electronic shipping systems would have to be re-engineered to recognize and embed an alert for each package that (1) is bound for an address in Maine; (2) contains tobacco products as defined by the Maine statute; and (3) is bound to an addressee who is 18 to 26 years old. (Meisel Decl. ¶ 42.)

***Response*: Admit.**

55.: UPS also would have to re-engineer its DIAD devices and supporting information systems to read and recognize such an alert. (Meisel Decl. ¶ 42.)

***Response*: Admit.**

56.: In the absence of smart labels, if UPS required that shippers of tobacco products to Maine write the age of the addressee on the package at the same place where they mark the package as a tobacco product shipment pursuant to Section 1555-C(3)(B), or if UPS otherwise first learned that a package contained a tobacco product when preloaders

performed a six-sided visual scan and detected a marking made in accordance with Section 1555-C(3)(C), then UPS would have to devise a method for the employees who research the deliverability of such packages also to alert the delivery person to perform the identification check, such as by creating a special stamp or label to be affixed on approved packages. (Meisel Decl. ¶ 43.)

***Response*: Admit.**

57.: In accordance with Section 1555-C(3)(C)(1) and (2), retailers of Maine-bound tobacco product delivery sales are required to utilize a delivery service that will require that shipments of such packages be addressed to, and signed for personally by, the purchaser. (Meisel Decl. ¶ 44.)

***Response*: Admit.**

58.: UPS's Delivery Confirmation Adult Signature Required Service does not require personal delivery to, and confirming signature from, only the named addressee – as opposed to a mail room attendant, receptionist, or any other person at the delivery address or, upon request, to any adult at the delivery address. (Meisel Decl. ¶ 45; Meisel Dep. at 176:24-177:2, 183:5-7.)

***Response*: Admit.**

59.: Delivering a package exclusively to, and obtaining a delivery signature exclusively from, the named addressee considerably expands the amount of time that a delivery person must spend at a delivery stop. (Meisel Decl. ¶ 46; Meisel Dep. at 173:8-17, 174:7-13.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a

particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

60.: Because Section 1555-C(3)(C) requires that a consumer who purchases a delivery-sale of tobacco products personally sign for the delivery, consumers who work outside the home during the typical work day (when carriers make their deliveries) will either have to direct those shipments to their workplace or make arrangements to be home at the anticipated time for the delivery. (Meisel Decl. ¶ 47.)

***Response*: Admit.**

61.: In most workplaces, a designated employee or type of employee typically is assigned the task of receiving cargo deliveries, such as a mail room attendant or receptionist. (Meisel Decl. ¶ 47.)

***Response*: Admit.**

62.: If UPS were making workplace deliveries of tobacco product delivery sales in Maine, it would not be able to deliver such a package to the designated employee who receives cargo deliveries, but instead would have to ask that person to contact the addressee and ask the addressee to come to the delivery area. (Meisel Decl. ¶ 47.)

***Response*: Admit.**

63.: In some workplaces, if UPS were making workplace deliveries of tobacco product delivery sales, the named addressee and the delivery could be located in different buildings, or on different floors of the same building. (Meisel Decl. ¶ 48.)

***Response*: Admit.**

64.: In some instances, if UPS were making workplace deliveries of tobacco product delivery sales, the addressee might be on the phone or have stepped away momentarily from his or her workstation or might otherwise be unavailable to come to the delivery area. (Meisel Decl. ¶ 48.)

***Response*: Admit.**

65.: In some instances, if UPS were making workplace deliveries of tobacco product delivery sales, it could take several minutes just to determine that the addressee is not even available to sign, in which case the process would have to be repeated the next day. (Meisel Decl. ¶ 48; Meisel Dep. at 174:7-13.)

***Response*: Admit.**

66.: Many classes of workers rarely (if ever) would be available to sign for such a package at a fixed address – such as truck drivers, police officers, construction workers, repair workers, and traveling sales representatives – and UPS might have to make repeated, futile attempts to deliver such packages to such people. (Meisel Decl. ¶ 48.)

***Response*: Admit.**

67.: If UPS were making deliveries of tobacco product delivery sales to a residence, the addressee may not be at home at the time that UPS's driver attempts the delivery, even if another adult is present at the residence. (Meisel Decl. ¶ 49.)

***Response*: Admit.**

68.: Attempting to deliver a package only to the named addressee could cause substantial delays on a delivery employee's delivery route, and thus threaten the timely

delivery of other packages on the employee's route. (Meisel Decl. ¶ 50.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

69.: In many cases, UPS likely would have to arrange to return packages containing delivery sales of tobacco products to the sender because they were unable to make delivery to the named addressee. (Meisel Decl. ¶ 50.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

70.: To impose a requirement on its shippers that Maine-bound packages containing delivery sales of tobacco products (1) be addressed to the purchaser and (2) be shipped only to purchasers of legal age to purchase tobacco products, UPS would have to alter, on a worldwide basis, its contractual and related documents that contain the terms and conditions of its service. (Meisel Decl. ¶ 51.)

***Response*: Admit.**

71.: To develop package delivery routes within a particular area, UPS conducts time studies to determine, on average, how long the driver will require at delivery stops and how long the driver will require between delivery stops. (Meisel Decl. ¶ 52; Meisel Dep. at 79:11-25.)

***Response*: Admit.**

72.: UPS relies on those time studies to create delivery routes in which, given known or expected package volumes,

drivers can complete all assigned package deliveries on their routes within the delivery deadlines for such packages. (Meisel Decl. ¶ 52.)

***Response*: Admit.**

73.: To increase efficiency, UPS relies on its time studies and historical data and puts drivers on the road only as required by the package volume for a particular day. (Meisel Decl. ¶ 52; Meisel Dep. at 186:2-5.)

***Response*: Admit.**

74.: The time required to complete a delivery stop that required delivery only to the named addressee (or to determine that such a delivery could not be completed) could vary widely – from a few seconds to several minutes – depending on the proximity and availability of the addressee at the time of delivery. (Meisel Decl. ¶ 52; Meisel Dep. at 196:2-11.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

75.: UPS determined that it is not practical for it to offer a service that guarantees delivery only to the named addressee because doing so would cause drivers to spend too much time per stop, would threaten on-time delivery of packages on a driver's route, and/or would force UPS to use more drivers per package, on modified routes, and thereby raise operating costs and prices. (Meisel Decl. ¶ 53; Meisel Dep. at 186:22-24, 187:2-13.)

***Response*: Deny.** UPS has not studied the cost or feasibility of providing a service that restricts delivery to a

particular person. *Meisel Dep.*, at 150:9 -151:2; 174:5-13; 187:2-12; 188:2-4; 196:3-11.

76.: If making personal deliveries of tobacco product delivery sales caused UPS drivers in Maine to have their workdays extended by one half hour, UPS would incur additional annual operating expenses of approximately $1.8 million – $60,000 annually for each additional workday minute. (Meisel Decl. ¶ 54; Meisel Dep. at 150:11-151:8, Ex. 9, 195:16-23.)

***Response*: Qualified.** The calculation means nothing, as it is only an order of magnitude, and is not tied to anything because UPS has not studied the feasibility or time requirements of providing personal deliveries. *Meisel Dep.*, at 195:7-196:11. Ms. Meisel testified that she just picked a number, with no science to back it up. *Meisel Dep.*, at 151:1-2.

77.: UPS examined how it could best comply with the Challenged Provisions' restrictions that (1) allow deliveries of tobacco products to persons other than licensed retailer or distributors, but only if the shipper of such a package is a licensed retailer, and (2) provide that a carrier is deemed to know that a package contains tobacco products if it is received from a person on the Attorney General's list of unlicensed tobacco retailers. (Meisel Decl. ¶ 55.)

***Response*: Deny.** UPS has not studied or analyzed the cost or time impact of providing such a service. *Meisel Dep.*, at 150:11-151:2; 174:5-13; 188:2-4; 195:7-196:11.

78.: To the extent that known unlicensed shippers were UPS account holders who receive daily pick-ups, UPS determined that the least disruptive way to recognize their packages that were transported to Maine for delivery

would be to specially process such shippers' packages at the point of origin into UPS's transportation system. (Meisel Decl. ¶ 56.)

***Response*: Deny.** UPS has not researched whether any of its regular shippers are on the list of known unlicensed tobacco retailers. *Meisel Dep.*, at 137:13-138:10. UPS has not altered its pick-up protocol in response to the Challenged Provisions. *Meisel Dep.*, at 139:1-4.

79.: Shippers on the Attorney General's list of known unlicensed shippers could contain retailers located in any of the 50 states, and could contain retailers located outside of the United States and, thus, could require that UPS institute such special procedures throughout its global operations, not just in Maine. (Meisel Decl. ¶ 56.)

***Response*: Deny.** The Challenged Provisions do not require UPS to institute special pick-up procedures. 22 M.R.S.A. §§ 1555-C, 1555-D.

80.: Known unlicensed shippers potentially could avoid UPS's special processing of their Maine-bound packages by introducing them to UPS's system through a storefront shipping outlet such as a Mail Boxes Etc. center. (Meisel Decl. ¶ 56.)

***Response*: Qualified.** Mail Boxes Etc. is now owned by UPS. *See* http://www.mbe.com/; and http://www.forbes.com/2001/03/05/0305ups.html. When a shipper without a UPS account tenders a package for shipment to an ASO, UPS identifies the ASO as the shipper, and has no other information about the person who initiated the shipment. *Butler Dep.*, at 101:17-102:5, 102:8-12, & 103:8-13; *Meisel Dep.*, at 76:8-16, 77:13-15, & 78:3-7. In such an instance, UPS could not be liable for knowingly delivering tobacco

products to a consumer in Maine because it is not receiving the package from a known unlicensed tobacco retailer. 22 M.R.S.A. § 1555-D.

81.: UPS concluded that the only way that UPS could ensure that it was not delivering packages in Maine from known unlicensed tobacco retailer would be to research every package to be delivered in Maine to determine if the shipper was on the list of known unlicensed shippers. (Meisel Decl. ¶ 57.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18. Further, UPS is not currently doing that research, yet appears to be complying with the provision of the law that prevents delivery of packages in Maine from known unlicensed tobacco retailers. *Meisel Dep.*, at 133:16-138:10.

82.: The time and effort required to conduct such research would have a tremendous adverse impact on UPS's operations, and would slow all UPS deliveries in Maine to a near standstill. (Meisel Decl. ¶ 57.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18. Further, UPS is not currently doing that research, yet appears to be complying with the provision of the law that prevents delivery of packages in Maine from known unlicensed tobacco retailers. *Meisel Dep.*, at 133:16-138:10

83.: UPS determined that, for at least three reasons, as of the effective date of the Challenged Provisions, it could no longer feasibly deliver tobacco products in Maine except to licensed retailers and distributors: (1) efforts to identify

all Maine-bound shipments from shippers on the list of known unlicensed shippers would be too disruptive of UPS operations in and outside of Maine, and would not always be effective; (2) UPS offered no service that met Section 1555-C's manner-of-delivery requirements for tobacco product delivery sales, so UPS could not lawfully be hired to make such deliveries to consumers and other unlicensed persons; and (3) UPS determined that it would be operationally impractical to implement new services and procedures that would comply with Section 1555-C's manner-of-delivery requirements because such services and procedures likely would be costly to design and implement, and likely would have been disruptive to UPS's Maine delivery operations. (Meisel Decl. ¶ 58; Meisel Dep. at 187:2-13.)

***Response*: Qualified.** Defendant admits that UPS does not currently provide a service that restricts delivery to the addressee. Defendant denies the remainder of the facts set forth herein. When asked how UPS determined it would not be practical to offer a service restricted delivery to the addressee, UPS's witness testified that she did not know, and that no feasibility studies were done. *Meisel Dep.*, at 186:15-188:12.

84.: In light of these extreme burdens, UPS concluded that the only possible way that it could make lawful deliveries of tobacco products to Maine would be to make deliveries only to licensed retailers and distributors and not to any other lawful addressee. (Meisel Decl. ¶ 58.)

***Response*: Deny.** When asked how UPS determined it would not be practical to offer a service restricted delivery to the addressee, UPS's witness testified that she did not know, and that no feasibility studies were done. *Meisel Dep.*, at 186:15-188:12.

85.: On September 10, 2003, UPS sent letters to its United States customers known or believed to be shippers of tobacco products, in which UPS notified them that, as of September 13, 2003, UPS would no longer accept any tobacco products shipments to the State of Maine except to recipients who are licensed tobacco distributors or retailers. (Meisel Decl. ¶ 59 & Ex. B; Meisel Dep. at 189:1-12; Butler Dep. at 23:19-24:6.)

***Response*: Admit.**

86.: UPS took steps to train its personnel in Maine – a total of approximately 600 employees – to comply with Section 1555-D and to reflect the change in UPS's policy regarding the delivery of tobacco products only to licensed retailers and distributors in the State of Maine. Specifically, UPS's training efforts consisted of the following steps:

- UPS made available to each of its operating centers in Maine lists of licensed tobacco retailers and licensed distributors in Maine, to whom packages containing tobacco products may lawfully be delivered;
- UPS disseminates updated lists of licensees to its operating centers in Maine, as updates become available;
- UPS instructed every operating center in Maine to establish procedures for all preloaders and drivers to ensure that they do not load or deliver packages containing tobacco products to unlicensed Maine addressees;
- On September 12, 2003, every business center in Maine dedicated its morning meeting with all preloaders and drivers of UPS delivery vehicles

(before the loading and delivery of packages to be delivered that day) to the new procedures for Maine tobacco products;

- At that meeting, preloaders and drivers were briefed on each business center's procedures for ensuring that no package containing tobacco products is delivered to unlicensed addressees in Maine. Specifically, preloaders and drivers were taught: (i) what constitutes a "tobacco product" under Maine law; (ii) how to identify packages that the preloader or driver knows or believes may contain tobacco products destined for addresses in Maine; (iii) how to determine whether a package containing tobacco products is destined for licensed addressee in Maine; and (iv) in the event that a package containing tobacco products is destined for an unlicensed addressee in Maine, to return the package for redelivery to the sender, to hold the package for pick-up by the sender or to destroy the package.

- To date, there have been two additional follow-up trainings for existing employees; in addition, such training is given to all new preloader and driver hires.

(Meisel Decl. ¶ 60; Meisel Dep. at 136:17-137:6, 156:16-21, 190:1-22 & Ex. 10; Butler Dep. at 31:14-32:24, 48:15-49:6, 54:25-55:18, 55:24-56:15, 80:16-18, 80:24-81:3, 93:9-95:22.)

***Response*: Qualified.** Every morning, before each shift, UPS holds a precommunication work meeting ("PCM") with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

87.: UPS adopted its policy of delivering packages containing tobacco products only to licensed addressees in

Maine to avoid the disruption and burden on UPS's operations caused by the Challenged Provisions, but UPS's policy has not eliminated such disruption and burden altogether. (Meisel Decl. ¶ 61; Meisel Dep. at 191:14-16.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18.

88.: UPS's compliance with Section 1555-D, through the operations procedures and training methods summarized above, continues to burden UPS with the costs and operational requirements involved in the following compliance efforts, among others: (i) maintaining and disseminating current lists of licensed addressees; (ii) training its personnel to follow the procedures UPS has enacted to comply with Section 1555-D; (iii) having preloaders and drivers identify packages that do or may contain tobacco products; (iv) having personnel research the addressees of such packages to determine whether the package may be delivered consistent with UPS's policy; and (v) returning or otherwise disposing of packages containing tobacco products that are destined for unlicensed addressees. (Meisel Decl. ¶ 62; Meisel Dep. at 105:19-108:23, 130:3-15, 135:1, 135:20-136:2, 192:3-16, 193:1-3; Butler Dep. at 49:12-50:9.)

***Response*: Deny.** UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18.

89.: UPS has estimated that identifying packages that may contain tobacco products has added approximately two seconds to the processing time of each of the approximately 65,000 packages that UPS process for delivery in Maine each day, at a cost to UPS of approximately $12,000

per month. (Meisel Decl. ¶ 63; Meisel Dep. at 111:12-112:1, Ex. 7; Butler Dep. at 89:11-25, 91:13-92:1.)

***Response*: Qualified.** Mr. Butler did no operational study, and stated that he does not know how to specifically quantify the impact, and that "it's very hard to tell" how much it is. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1. Further, Mr. Butler was not listed or qualified as an expert witness.

90.: Based on established time studies for analogous look-up tasks, UPS estimates that, when packages are identified to contain tobacco products, it costs UPS approximately $2 per identified package to research whether the addressee is a licensed retailer or distributor. (Meisel Decl. ¶ 63; Meisel Dep. at 122:16-22, 126:6-25, 192:3-16.)

***Response*: Admit.**

91.: In addition to the costs UPS has incurred in the course of ensuring its compliance with Section 1555-D, UPS has lost revenue as a result of turning away business that it lawfully could deliver even after the Challenged Provisions became effective, namely, tobacco product shipments to Maine from retailers licensed by Maine. (Meisel Decl. ¶ 64.)

***Response*: Deny.** There is no evidence in the record that UPS has turned away business. UPS has actually increased its revenue. *George Dep.*, at 37:25-28:4. UPS has lost volume, but that is due to two customers choosing to ship through other carriers. *George Dep.*, at 13:5- 14:16. Ms. Meisel's Declaration directly contradicts her deposition testimony, in which she testified that she did not know whether UPS refused the business, or whether the shippers voluntarily began using the services of the postal

service. *Meisel Dep.*, 212:5-20. On those grounds, defendant respectfully moves to strike Fact No. 91.

* * *

DATED: August 30, 2004

Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

/s/ Melissa R. O'Dea
MELISSA REYNOLDS O'DEA
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2004, I electronically filed a redacted version of this, *Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts,* with the Clerk of Court, and caused to be delivered an unredacted version under seal with the Court and the parties. There are no non-registered parties requiring service by mail.

/s/ Melissa R. O'Dea
MELISSA REYNOLDS O'DEA

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant.	CIVIL ACTION NO.: 03-CV-178-B-DBH

DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * *

2. UPS employees visually scan the exterior of packages at many stages through the distribution process. *Meisel Dep.*, at 101:15-102:5 & 213:13-270:10; see also *Meisel Dep.*, Exhibit 13.

* * *

4. When a package enters the UPS system, the driver or the customer counter clerk visually scans the entire package – all six sides. *Meisel Dep.*, at 103:15-104:17.

9. When a driver picks up a package, he visually scans the package. *Meisel Dep.*, at 62:2-21, 68:11-18, 72:24-25, & 74:3.

* * *

11. The unloader visually inspects the package. *Meisel Dep.*, at 69:22-23.

* * *

22. The customer counter employees are instructed to visually inspect all six sides of the package to make sure that it is in good condition and also look for markings on the package. *Meisel Dep.*, at 31:5-7, & 15-20; *George Dep.*, at 70:3-10.

* * *

27. The sorter also is looking at packages to ensure that they are in good condition. *Meisel Dep.*, at 48:11-12.

* * *

29. Loaders are looking at packages to ensure that they are in good condition, and are also reading labels to confirm that they are being loaded into the proper trailer. *Meisel Dep.*, at 48:7-18.

30. Loaders also look for markings on the exterior of the package. *Meisel Dep.*, at 49:1-3.

* * *

37. Sorters visually inspect packages and their labels. *Butler Dep.*, at 35:9-12.

38. Sorters also identify potential problems with packages, including open packages, damaged packages or

packages with markings that may indicate hazardous materials. *Butler Dep.*, at 35:13-23; & 36:18-24.

* * *

47. The preloader inspects the package for markings, and also to determine the delivery address. *Meisel Dep.*, at 54:7-17.

48. Preloaders are trained to notice and segregate many types of non-deliverable packages, all of which require them to spend additional time with a particular package. *Meisel Dep.*, at 112:2-113:5.

* * *

51. UPS's time projections for drivers are also based on real life historical data, which inherently includes various types of delays. *Meisel Dep.*, at 184:6-20.

52. UPS's services can be delayed by a number of factors, including weather, fluctuating volume, equipment breakdown, employee absences, customer contact, waiting for elevators, and waiting to obtain signatures. *Meisel Dep.*, at 83:13-84:7; 184:21-185:9.

* * *

54. A UPS driver carries a hand-held computer called a digital information acquisition device, or DIAD. *Butler Dep.*, at 82:1-5; *Meisel Dep.*, at 58:1-3.

55. A DIAD captures data about a package and facilitates the record of delivery of a package. *Butler Dep.*, at 82:6-8.

56. This data includes the tracking number, the address that the package was addressed to, and may

include the address to which the package was actually delivered. *Meisel Dep.*, at 58:4-8.

57. Before delivering a package, at the point of delivery, a UPS driver scans the package's bar code with the DIAD. *George Dep.*, at 76:19-77:11; *Butler Dep.*, at 82:14-16:22-25; *Meisel Dep.*, at 59:10-22.

58. In addition, the driver keys additional information into the DIAD to indicate the address to which the package is being delivered, mating the bar code or the tracking number to the delivery address. *Butler Dep.*, at 82:15-19.

59. When a driver scans a package at the point of delivery, the DIAD generates different types of alerts. *Meisel Dep.*, at 59:23-25, & 61:8-11.

60. An alert is generated from an indicator that is embedded in the label and recognized by the DIAD. This type of label is referred to as a "smart label." *Meisel Dep.*, at 61:8-21.

* * *

62. One type of DIAD alert is an indication that a package was delivered later than the guaranteed delivery time. *Butler Dep.*, at 83:14-23; *Meisel Dep.*, at 60:2-10.

63. The DIAD also generates a prompt to obtain a signature if one is required before delivery. *Meisel Dep.*, at 60:10-20.

64. UPS has the capability, within the DIAD, to flag specific delivery addresses to generate an alert. *Meisel Dep.*, at 142:4-18.

65. UPS has the capability, within the DIAD, to flag specific consignees to generate an alert. *Meisel Dep.*, at 208:8-12.

* * *

69. The DIAD can be programmed to generate a prompt for a particular shipper to direct the driver's behavior. *Meisel Dep.*, at 208:22-209:24.

* * *

72. UPS offers a service called "delivery confirmation" for a fee of $1.00. *Meisel Dep.*, at 176:1-8.

73. UPS offers a service called "delivery confirmation, signature required" for a fee of $2.00. *Meisel Dep.*, at 176:9-13.

74. UPS offers a service called "delivery confirmation, adult signature required" ("DCASR") for a modest fee of either $1.75 or $2.75. *George Dep.*, at 76:3-7; *Meisel Dep.*, at 176:14-17.

75. When a driver attempts to deliver a package that has been shipped using DCASR, that driver receives a prompt on his DIAD to verify that the person receiving the package is 21 years of age. *George Dep.*, at 76:14-77:11.

76. To verify age, the driver would typically ask to see a form of identification. *George Dep.*, at 76:14-18.

77. When delivering a package with DCASR, a driver uses his instinct to decide whether to obtain identification verifying age. *Meisel Dep.*, at 182:2-14.

78. DCASR is priced profitably. *Meisel Dep.*, at 179:15-25.

79. If UPS discovers that one of its products is not profitable, it will adjust the price it charges for that product. *Meisel Dep.*, at 180:1-8.

80. UPS may lose money on particular packages, but the products are priced so that they are profitable on average. *Meisel Dep.*, at 180:17-181:2.

81. When UPS is unable to deliver a package on the first attempt, UPS makes two additional attempts to deliver the package. *Butler Dep.*, at 86:7-11.

* * *

86. UPS does not charge an additional fee when it has to return a non-deliverable package to the shipper. *George Dep.*, at 60:3-12.

* * *

101. On September 10, 2003 UPS sent a letter to certain customers informing those shippers that, in response to the Challenged Provisions, UPS has elected to discontinue shipping tobacco products to consumers in Maine. *George Dep.*, at 78:3-16, 80:6-15, & Exhibit 20.

102. The customers who received this letter were selected by their "SIC Code", which is a universal marketing code companies use to classify the type of commodity that a company manufactures or ships. *George Dep.*, at 81:1-9; *Meisel Dep.*, at 272:16-22.

103. By using an "SIC Code", UPS was able to pull up a list of its customers who sell tobacco. *George Dep.*, at 81:15-20; *Meisel Dep.*, at 272:23-273:19.

* * *

105. UPS decided to create a procedure to intercept Maine-bound packages containing tobacco focused on the preload position, because preloaders have more time to look at packages than sorters and unloaders do. *Butler Dep.*, at 54:10-20; *Meisel Dep.*, at 109:2-17.

106. Every morning, before each shift, UPS holds a precommunication work meeting ("PCM") with its drivers and preloaders. *George Dep.*, at 53:8-14, & 54:3-4; *Butler Dep.*, at 48:6-10; *Meisel Dep.*, at 157:3-4, & 190:16-17.

107. A PCM typically lasts three to five minutes. *George Dep.*, at 53:25-54:2; *Butler Dep.*, at 48:11-12.

108. On September 12, 2003, at a regularly scheduled PCM at UPS business centers in Maine information was provided regarding the delivery of tobacco products. *Butler Dep.*, at 49:15-23.

109. Preloaders and drivers were told to look for markings that indicated tobacco products were contained in a package. *George Dep.*, at 55:4-12, & 56:4-14.

110. UPS requires its preloaders in Maine to look at packages for evidence of tobacco. *Butler Dep.*, at 88:2-7; *Meisel Dep.*, at 106:1-13, & 107:8-13.

111. Although unable to specifically quantify how much additional time a preloader in Maine must spend scanning packages, John Butler, a sales manager for UPS,, opined that he thinks it takes a preloader an additional 56 one hundred-thousandths of an hour, or two seconds per package. Mr. Butler did no operational study, and stated that he does not know how to specifically quantify the impact, and that "it's very hard to tell" how much it is. *Butler Dep.*, at 5:18-7:17, 88:2-89:7 & Exhibit 8; *see also Meisel Dep.*, at 111:12-112:1.

112. Drivers were also told to notice indicia of tobacco on packages, and refrain from delivering any such package. *Meisel Dep.*, at 106:15-20.

113. The driver looks at the package for obvious markings and reads the label. *Meisel Dep.*, at 124:1-12.

114. UPS has done no study or analysis to determine whether a driver spends any additional time looking at Maine bound packages. *Meisel Dep.*, at 148:15-19; 149:9-10.

115. Preloaders and drivers were also told to give any packages they found to the ECS clerk. *George Dep.*, at 57& Exhibit 14.

116. The same PCM was repeated at UPS business centers in Maine in January 2004 and in June 2004. *Butler Dep.*, at 49:2-6.

117. There was no training provided beyond the PCM. *George Dep.*, at 56:13-14; *Meisel Dep.*, at 154:12-155:7; 159:3-6; 160:8-161:1.

118. Other than what was instructed during the PCM, UPS has not created any process to identify and specially handle packages that contain cigarettes. *George Dep.*, at 67:9-14.

119. UPS's gross revenue in 2003 was $33.5 billion. *Meisel Dep.*, at 201:7-10.

* * *

121. UPS has over 4,000 employees in the technology and information systems area. *Meisel Dep.*, at 168:17-20; 202:2-5.

* * *

126. UPS had intercepted thirty-three (33) packages destined for a Maine consumer that UPS believed to contain tobacco products. *Butler Dep.*, at 52:16-17; *Meisel Dep.*, at 190:20-25.

* * *

128. Although UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages. *Meisel Dep.*, at 122:13-123:13.

* * *

133. UPS has not done any studies to determine the effect of the Challenged Provisions on that rate. *Meisel Dep.*, at 153:14-21.

134. The State provides UPS with an electronic version of its list of known unlicensed tobacco retailers who may be attempting to unlawfully ship tobacco to Maine consumers. *Meisel Dep.*, at 134:16-136:5.

135. UPS has not researched whether any of its regular shippers are on the list of known unlicensed tobacco retailers. *Meisel Dep.*, at 137:13-138:10.

* * *

141. From a systems perspective, UPS is capable of doing pretty much anything, including providing that service. *Meisel Dep.*, at 274:12-275:10.

142. UPS changes its paper shipping forms generally once a year. *Meisel Dep.*, at 167:11-15.

143. The forms are revised to reflect changes, such as new products or services or new rates. *Meisel Dep.*, at 167:20-168:7.

144. UPS changes the fields in it computer system at least once a year to reflect the same types of changes. *Meisel Dep.*, at 167:16-168:7.

145. UPS modifies its shipping systems a minimum of once a year, but potentially more often. *Meisel Dep.*, at 168:8-13.

146. Those changes often include the addition of a data field. *Meisel Dep.*, at 169:5-9.

147. UPS has not sized the impact of the procedures they have implemented to comply with the Maine law. *Meisel Dep.*, at 194:17-18.

148. UPS has not made any changes to its information systems to comply with the Challenged Provisions. *Meisel Dep.*, at 202:13-18.

149. UPS has implemented written procedures and policies relating to the delivery of alcohol. *George Dep.*, at 86:3-6.

150. Drivers are trained to handle packages containing alcohol. *Meisel Dep.*, at 204:7-205:7.

151. UPS holds PCMs regarding the transportation of alcohol. *Meisel Dep.*, at 205:8-11.

152. UPS has implemented written procedures and policies relating to the delivery of handguns. *George Dep.*, at 95:1-5; *Butler Dep.*, at 78:12-23.

153. Shippers of handguns verbally inform the pick-up driver of the package's contents, and are prohibited from marking the package in any way. *Meisel Dep.*, at 92:3-13.

154. Packages containing firearms are segregated from other packages. *Meisel Dep.*, at 92:23-93:1.

155. Firearms must be shipped using next day air and require an adult signature. *Meisel Dep.*, at 93:1-5.

156. UPS employees are trained to handle packages containing firearms. *Meisel Dep.*, at 205:24-206:10.

* * *

160. Based upon this figure, Butler opined that for the five month period from September of 2003 through January of 2004, it cost UPS an additional $62,653.24 to deliver 6,936,193 packages in Maine due to the Challenged Provisions. *Butler Dep.*, at Exhibit 8.

161. Using the figures in the prior paragraph, if correct, the Challenged Provisions cost UPS an additional $ 0.009 (or less than 1 cent) per package. [This figure is calculated by dividing the additional $62,653.24 in costs by the 6,936,193 packages delivered in Maine.]

* * *

DATED: August 9, 2004 Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

/s/ MELISSA REYNOLDS O'DEA
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2004, I electronically filed a redacted version of this, *Defendant's Statement of Undisputed Material Fact in Support of Motion for Summary Judgment*, with the Clerk of Court, and caused to be delivered an unredacted version under seal with the Court and the parties. There are no non-registered parties requiring service by mail.

/s/ MELISSA REYNOLDS O'DEA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No: 1:03-cv-178-DBH

PLAINTIFFS' OPPOSITION TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, INCLUDING PLAINTIFFS' ADDITIONAL UNDISPUTED MATERIAL FACTS

* * *

PLAINTIFFS' RESPONSE TO DEFENDANT'S UNDISPUTED MATERIAL FACTS

* * *

2. Qualified. Defendant's Undisputed Material Fact No. 2 (that "UPS employees visually scan the exterior of packages at many stages through the distribution process") is misleading to the extent that it implies that such UPS employees' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.[2])

* * *

4. Disputed. The cited evidence does not support Defendant's Undisputed Material Fact No. 4 (that "[w]hen a package enters the UPS system, the driver or the customer counter clerk visually scans the entire package – all six sides"). Indeed, the cited deposition testimony states, "That doesn't mean they have to look at all six sides to see what it is they need to see." (Meisel Dep. at 103:22-24.)

* * *

9. Qualified. Defendant's Undisputed Material Fact No. 9 (that "[w]hen a driver picks up a package, he visually scans the package") is misleading to the extent that it implies that UPS drivers' scanning includes searching for and reading text that does not appear on a package's label. (Meisel Dep. at 232:18-233:3.)

* * *

11. Qualified. Defendant's Undisputed Material Fact No. 11 (that "[t]he unloader visually inspects the package") is misleading to the extent that it implies that UPS unloaders' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. at 232:18-233:3.)

* * *

[2] The deposition pages cited throughout Plaintiffs' Opposition to Defendant's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment were attached to Defendant's Discovery Citation in Support of Defendant's Motion for Summary Judgment, lodged with this Court on August 9, 2004.

22. Qualified. The evidence in the record does not support Defendant's Undisputed Material Fact No. 22 (that "[t]he customer counter employees are instructed to visually inspect all six sides of the package to make sure that it is in good condition and also look for markings on the package) because it is qualified by the testimony that UPS employees do not necessarily "look at all six sides to see what it is they need to see." (Meisel Dep. at 103:21-24.) In addition, the asserted fact is misleading to the extent that it implies that such UPS employees' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.)

* * *

27. Undisputed.

* * *

29. Undisputed.

30. Qualified. Defendant's Undisputed Material Fact No. 30 (that "[l]oaders also look for markings on the exterior of the package) is misleading to the extent that it implies that such loaders' scanning includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.) Moreover, the cited deposition testimony states that loaders "may look" for markings on the exterior of the package. (*See* Meisel Dep. at 49:1-3.)

* * *

37. Qualified, to the extent that Defendant's Undisputed Material Fact No. 37 (that "[s]orters visually inspect packages and their labels") implies that sorters' visual inspection of packages includes searching for and reading text that does not appear on a package's label. (*See* Meisel Dep. 232:18-233:3.)

38. Undisputed.

* * *

47. Qualified. Defendant's Undisputed Material Fact No. 47 (that "[t]he preloader inspects the package for markings, and also to determine the delivery address) is misleading to the extent that it implies that preloaders' inspection of packages includes searching for and reading text that does not appear on a package's label, which is only the case in Maine. (*See* Meisel Dep. 232:18-233:3.)

48. Undisputed.

* * *

51. Undisputed.

52. Undisputed.

* * *

54. Qualified. Defendant's Undisputed Material Fact No. 54's (that "[a] UPS driver carries a hand-held computer called a digital information acquisition device, or DIAD") reference to "DIAD" actually stands for "*Delivery* Information Acquisition Device." (Meisel Dep. at 57:25-58:3.)

55. Undisputed.

56. Undisputed.

57. Undisputed.

58. Undisputed.

59. Undisputed.

60. Undisputed.

* * *

62. Undisputed.

63. Undisputed.

64. Undisputed.

65. Undisputed.

* * *

69. Undisputed.

* * *

72. Undisputed.

73. Undisputed.

74. Qualified. The cited deposition testimony in support of Defendant's Undisputed Material Fact No. 74 (that "UPS offers a service called 'delivery confirmation, adult signature required' ('DCASR') for a modest fee of either $1.75 or $2.75") does not characterize the fee as "modest." The correct fee for this service is $2.75. (*See* George Dep. at 76:3-7; Meisel Dep. at 176:14-17.)

75. Undisputed.

76. Undisputed.

77. Undisputed.

78. Qualified. The cited deposition testimony in support of Defendant's Undisputed Material Fact No. 78 (that "DCASR is priced profitably") states that the deponent believed that DCASR was priced profitably, and it was UPS's intent for it to be priced profitably. (*See* Meisel Dep. at 179:15-25.)

79. Undisputed.

80. Undisputed.

81. Undisputed.

* * *

86. Undisputed.

* * *

101. Qualified. The cited deposition testimony and exhibit in support of Defendant's Undisputed Material Fact No. 101 (that "[o]n September 10, 2003 UPS sent a letter to certain customers informing those shippers that, in response to the Challenged Provisions, UPS has elected to discontinue shipping tobacco products to consumers in Maine") do not characterize UPS's decision as an "election."

102. Undisputed.

103. Undisputed.

* * *

105. Undisputed.

106. Undisputed.

107. Undisputed.

108. Undisputed.

109. Undisputed, though not supported by the cited evidence.

110. Undisputed.

111. Disputed. Defendant's Undisputed Material Fact No. 111 (that "[a]lthough unable to specifically

quantify how much additional time a preloader in Maine must spend scanning packages, John Butler, a sales manager for UPS, opined that he thinks it takes a preloader an additional 56 one hundred-thousandths of an hour, or two seconds per package. Mr. Butler did no operational study, and stated that he does not know how to specifically quantify the impact, and that 'it's very hard to tell' how much it is") is inaccurate. First, to the extent that it states that "Mr. Butler did no operational study," the fact is contrary to the cited deposition testimony of Mr. Butler, which states that he "evaluated how long it would take someone to read a label thoroughly above and beyond the normal quick evaluation of what needs to be done."

Second, to the extent that it states that Mr. Butler was "unable to specifically quantify how much additional time" it takes a preloader in Maine to perform a tobacco indicator check, the fact is incorrect because Mr. Butler's analysis *did* quantify this figure as 56 one hundred-thousandths of an hour based on established UPS benchmark time studies. The cited deposition testimony of Mr. Butler states that he could not quantify the time by which the Challenged Provisions "slowed down the processing of preload packages."

112. Undisputed.

113. Undisputed.

114. Qualified. Defendant's Undisputed Material Fact No. 114 (that "UPS has done no study or analysis to determine *whether* a driver spends any additional time looking at Maine bound packages") is inaccurate in that the cited testimony indicates that UPS has not specifically quantified *how much* additional time drivers spend. In addition, the record reflects that UPS has analyzed and

determined that drivers would spend additional time delivering packages personally to the named addressee, as required by one of the Challenged Provisions, and has quantified the cost that it would incur by adding even a minute to each Maine drivers' day. (*See* Meisel Dep. at 149:8-151:8.)

115. Undisputed.

116. Undisputed.

117. Disputed. Defendant's Undisputed Material Fact No. 117 (that "[t]here was no training provided beyond the PCM") overlooks training to personnel assigned the task of researching whether the addressee of such packages is licensed as a tobacco distributor or retailer in Maine. (*See* Pls.' SMF 135.)

118. Undisputed.

119. Undisputed.

* * *

121. Undisputed.

* * *

126. Qualified. Defendant's Undisputed Material Fact No. 126 (that "UPS had intercepted thirty-three (33) packages destined for a Maine consumer that UPS believed to contain tobacco products") is qualified as follows: from all of the packages that UPS employees segregated as potentially containing tobacco products, thirty-three packages were withheld and not delivered to their intended recipients.

* * *

128. Qualified. Defendant's Undisputed Material Fact No. 128 (that "[a]lthough UPS has not done any time studies, UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to deal with each of those packages") is qualified as follows: UPS estimates that it cost approximately $2.00 in personnel time for the ECS clerk to research packages in Maine indicated to contain tobacco products, based on time studies of analogous tasks.

* * *

133. Undisputed.

134. Undisputed.

135. Undisputed.

* * *

141. Qualified. The cited deposition testimony qualifies Defendant's Undisputed Material Fact No. 141 (that "[f]rom a systems perspective, UPS is capable of doing pretty much anything, including providing that service") with the word "probably." UPS objects to this fact to the extent that it implies UPS can do anything cost-effectively.

142. Undisputed.

143. Undisputed.

144. Undisputed.

145. Undisputed.

146. Undisputed.

147. Qualified. Defendant's Undisputed Material Fact No. 147 (that "UPS has not sized the impact of the

procedures they have implemented to comply with the Maine law") is qualified as follows: UPS has estimated the impact of the procedures they have implemented to comply with the Challenged Provisions, based on known benchmarks for analogous activities.

148. Undisputed.

149. Undisputed.

150. Undisputed.

151. Undisputed.

152. Undisputed.

153. Undisputed.

154. Undisputed.

155. Undisputed.

156. Undisputed.

* * *

160. Qualified. The figure represented in Defendant's Undisputed Material Fact No. 160 (that "[b]ased upon this figure, Butler opined that for the five month period from September of 2003 through January of 2004, it cost UPS an additional $62,653.24 to deliver 6,936,193 packages in Maine due to the Challenged Provisions") applies to identifying packages marked to contain tobacco. Once packages are so identified, UPS incurs an approximate cost of $2 per package to research whether they can be delivered.

161. Undisputed.

* * *

Respectfully submitted.

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

MICHAEL A. NELSON
JENSEN BAIRD GARDNER & HENRY
10 Free Street
P.O. Box 4510
Portland, ME 04112-4510
Telephone: (207) 775-7271

By: /s/ Michael A. Nelson
Michael A. Nelson

Attorneys for Plaintiffs
NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.

CERTIFICATE OF SERVICE

I, Michael A. Nelson, hereby certify that on August 30, 2004 I electronically filed a redacted version of **PLAINTIFFS' OPPOSITION TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, INCLUDING PLAINTIFFS' ADDITIONAL UNDISPUTED MATERIAL FACTS** with the Clerk of Court. An unredacted version was transmitted to the

Court today by Hand Delivery, and to Defendant's counsel by electronic mail. There are no non-registered parties requiring service by first-class United States mail.

Dated at Portland, Maine this 30th day of August 2004.

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000

MICHAEL A. NELSON
JENSEN BAIRD GARDNER & HENRY
10 Free Street, P.O. Box 4510
Portland, ME 04112-4510
Telephone: (207) 775-7271

By: /s/ Michael A. Nelson

Attorneys for Plaintiffs
NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.

UNITED STATES DISTRICT COURT

FOR THE
DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, v. G. STEVEN ROWE, in his official capacity as Attorney General for the State of Maine, Defendant.	CIVIL ACTION NO.: 03-CV-178-B-DBH

DEFENDANT'S RESPONSE TO PLAINTIFFS' ADDITIONAL MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56(c), defendant, Maine Attorney General G. Steven Rowe, hereby responds to each additional fact set forth in plaintiff's opposition to defendant's statement of undisputed material facts in support of motion for summary judgment. In responding to plaintiff's additional facts, defendant, by admitting, denying or qualifying the facts, does not concede that any of the facts are material.

Response to Plaintiff's Additional Undisputed Material Facts

First, plaintiffs attempt to summarize the undisputed material facts submitted in support of their motion for summary judgment. Defendant has already responded to each of those facts in Defendant's Opposing Statement of Material Facts filed on August 30, 2004 in support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment. Defendant incorporates by reference those responses as if fully set forth herein.

166.: The DIAD can recognize account numbers of shippers who have a UPS account; it cannot read shipper names. (*See* Meisel Dep. at 208:13-209:2.)

***Response*: Admit.**

DATED: September 14, 2004

Respectfully submitted,

G. STEVEN ROWE
Attorney General

PAUL STERN
Deputy Attorney General

/s/ MELISSA REYNOLDS O'DEA
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
Fax (207) 287-3145

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2004, I electronically filed a redacted version of this, *Defendant's Response to Plaintiffs' Additional Material Facts*, with the Clerk of Court, and caused to be delivered an unredacted version under seal with the Court and the parties. There are no non-registered parties requiring service by mail.

/s/ MELISSA REYNOLDS O'DEA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC., Plaintiffs, -v- G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine, Defendant.	Case No. 1:03-cv-178-DBH

SECOND AMENDED JUDGMENT

JUDGMENT is hereby entered for the plaintiffs, New Hampshire Motor Transport Association, Massachusetts Motor Transportation Association, Inc., and Vermont Truck & Bus Association, Inc., and against the defendant, the Maine Attorney General, on the plaintiffs' claim that the Federal Aviation Administration Authorization Act of 1994 preempts 22 M.R.S.A. § 1555-C(3) in its entirety. The Maine Attorney General is enjoined from enforcing 22 M.R.S.A. § 1555-C(3)(C).

FURTHER, JUDGMENT is hereby entered for the plaintiffs, and against the defendant, on plaintiffs' claim that the Federal Aviation Administration Authorization Act of 1994 preempts enforcement of so much of 22

M.R.S.A. § 1555-D as imposes constructive or imputed knowledge that a carrier has delivered a tobacco product if the package containing the product is marked as containing tobacco as required by 22 M.R.S.A. § 1555-C(3)(B) or if the seller's name appears on the Attorney General's list maintained pursuant to 22 M.R.S.A. § 1555-D(1). the Maine Attorney General is enjoined from enforcing so much of 22 M.R.S.A. § 1555-D as imposes constructive or imputed knowledge that a carrier has delivered a tobacco product if the package containing the product is marked as containing tobacco as required by 22 M.R.S.A. § 1555-C(3)(B) or if the seller's name appears on the Attorney General's list maintained pursuant to 22 M.R.S.A. § 1555-D(1), against any motor carrier, air carrier, or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement) (as those terms are used in 49 U.S.C. § 14501(c)(1) and 49 U.S.C. § 41713(b)(4)).

FURTHER, JUDGMENT is hereby entered for the defendant and against the plaintiffs on the plaintiffs' claim that the Federal Aviation Administration Authorization Act of 1994 preempts so much of 22 M.R.S.A. § 1555-D as bans the knowing delivery of contraband tobacco by carriers, except as set forth in the preceding paragraph of this judgment.

FURTHER, JUDGMENT is hereby entered for the defendant, and against the plaintiffs on the plaintiffs' claims that the Federal Aviation Administration Authorization Act of 1994 preempts 22 M.R.S.A. § 1555-C(3)(A).

WILLIAM S. BROWNELL
Clerk of Court

/s/ Melody Whitten
By: Melody Whitten
Deputy Clerk

Dated this 29th day of June, 2006